U.S. v. HUBBARD: PROSECUTING FALSE STATEMENTS TO CONGRESS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

JUNE 30, 1995

Serial No. 41

Printed for the use of the Committee on the Judiciary

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CONTENTS

HEARING DATE

OPENING STATEMENT

WITNESSES

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

U.S. v. HUBBARD: PROSECUTING FALSE STATEMENTS TO CONGRESS

FRIDAY, JUNE 30, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:37 a.m., in room 2237, Rayburn House Office Building, Hon. Bill McCollum (chairman of the subcommittee) presiding.

Present: Representatives Bill McCollum, Steven Schiff, Howard Coble, Fred Heineman, Ed Bryant of Tennessee, Steve Chabot, Bob Barr, Charles E. Schumer, Robert C. Scott, Zoe Lofgren, Sheila Jackson Lee, and Melvin L. Watt.

Also present: Paul J. McNulty, chief counsel; Glenn R. Schmitt, counsel; Daniel J. Bryant, assistant counsel; Aerin D. Dunkle, research assistant; Audrey Clement, secretary; and Tom Diaz, minority counsel.

OPENING STATEMENT OF CHAIRMAN McCOLLUM

Mr. MCCOLLUM. The subcommittee will come to order. Good morning.

This morning we're going to look at a special section of the law that for decades has been a powerful tool in the hands of prosecutors seeking to address the willful misleading of the executive, judicial, and legislative branches. That is section 1001 of title 18 of the U.S. Code.

It has been a long-haul statute. It has been around quite a long time. Over the years section 1001 has been used to prosecute a wide variety of misconduct. Notable prosecutions under section 1001 include those of Lieutenant Colonel North and Admiral Poindexter, and more recently the case against former Congressman Rostenkowski.

On May 15, 1995, the U.S. Supreme Court dramatically changed criminal law dealing with the offense of willfully misleading a branch of the Government. In the case of *Hubbard* v. *United States,* the Supreme Court limited the application of section 1001 to only the executive branch, leaving the offenses of lying to Congress in the courts outside its scope.

As a consequence, Congress is faced with a decision. Do we want to amend 1001 so as to return to the state of the law before the *Hubbard* decision? And if so, how? Whatever our decision, we must proceed with care. Certain legislative fixes may be unintentionally problematic over the long run.

In amending section 1001, we must guard against criminalizing behavior which was not criminal before the *Hubbard* decision. For example, do we want an amended section 1001 which makes a lobbyist's statement to a congressional aide a criminal act if it is later shown that that statement was false?

Moreover, we must take seriously the concern raised by the Court regarding the effect of this statute on our adversarial system of justice. Statutes which deter quality representation of criminal defendants must be avoided.

Everyone should want to ensure that law enforcement has the ability to punish those who willfully mislead Congress, but that ability must be weighed against our commitment to free speech, a balanced adversarial system of justice, and a genuine separation of power between the three branches of government.

My friend from New Jersey, Bill Martini, is to be commended for his prompt response to the *Hubbard* decision. The bill that he introduced, H.R. 1678, the Government Accountability Act, is an excellent starting point for this subcommittee as it begins to take action.

I would like to thank all the witnesses for coming today. I look forward particularly to the testimony of Congressman Martini and those who follow after him. I am at this point in time going to introduce my good friend.

I'd like to welcome our guest in the first panel who is Congressman Martini. He was elected to the House of Representatives from the Eighth Congressional District of New Jersey in November 1994. He serves on the Committee on Transportation and Infrastructure as well as the Committee on Government Reform and Oversight.

In addition, Congressman Martini is a member of the Congressional Crime Task Force and the Congressional Immigration Task Force. He has been a prominent New Jersey attorney for many years. He's a former Federal and county prosecutor. He relinquished his Cedar Grove law practice upon taking office as a U.S. Representative.

Bill Martini is a graduate of Villanova University and received his law degree from Rutgers University Law School in 1972. Mr. Martini is active in many civic and charitable organizations, serving as a trustee of the United Way of Passaic County, the Center for Italian-American Culture, and the Passaic Valley Council of the Boy Scouts of America.

I'm sure I mispronounced your county. You can correct me for that. But welcome, Bill. We're happy to have you here today, particularly because you have been able to craft this piece of legislation, to initiate our effort to take a reexamination of section 1001.

STATEMENT OF HON. WILLIAM J. MARTINI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. MARTINI. Well, thank you, Mr. Chairman. It's a pleasure to be here before you and the other members of the subcommittee. I thank you for providing me the opportunity to testify before you today.

I think, as you so ably put it already, my intent is to present this legislation as a beginning point for a dialogue which—and certainly

it's my intent to work with this committee and to finalize and formulate a final product—we can bring to the floor.

I would like to start, I think it's probably most appropriate to start by simply reciting section 1001 of title 18 of U.S. Code. That statute reads as follows: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined $250,000 or $500,000 for an organization, or imprisoned not more than 5 years or both."

The question before us today is whether or not individuals who knowingly and intentionally issue a fraudulent or false statement to the legislative or judicial branch of the Federal Government should be subject to criminal prosecution under title 18 of section 1001. The legislation I am proposing, the Government Accountability Act, H.R. 1678, is intended to amend section 1001 in such a manner as to make its application consistent with the legal precedents established prior to the recent Supreme Court decision in *Hubbard* v. *United States.*

Under the *Hubbard* decision, section 1001 is now only applicable to individuals who knowingly issue a false statement to the executive branch of the Federal Government or a department or agency thereof. The Court has ruled that false statements made by individuals to the legislative or judicial branch of government can no longer be prosecuted under section 1001. This is based on their interpretation of the plain meaning of the language of the statute and their interpretation that the language or words, department, or agency of the United States, does not apply to the courts, and by inference does not apply to the Congress.

This holding was contrary to 40 years of legal precedent established by a 1955 Supreme Court ruling in *Bramblett* v. *United States.* In that case, *Bramblett*, the defendant, was a former Congressman who was convicted of orchestrating a ghost employee scheme. The Court held that Bramblett, "Falsely and fraudulently represented to the disbursing office of the House of Representatives that a named woman was entitled to compensation as his official clerk."

In *Bramblett,* a lower court found that the false statement statute was meant to describe the executive, legislative and judicial branches of the Government. Thus, persons who made false statements to the legislative branch could be and were after *Bramblett*, prosecuted under section 1001.

In *Hubbard,* the Supreme Court this year held that, "A court is neither a department nor an agency within the meaning of section 1001." They did that based upon their understanding and reading of the plain language of the statute. This clearly implies that Congress is certainly not an agency or department of the executive branch. In fact, a lower court has recently used *Hubbard* to overturn the conviction of a former HUD official who lied to Congress.

In an effort to clarify the existing law, I have introduced the Government Accountability Act, H.R. 1678. By amending section 1001

of title 18 to include the proposed language, by striking "any department or agency" of the United States, and inserting the language, "The executive, legislative or judicial branch or any department or agency thereof." This would, in my opinion, make title 18, section 1001, of title 18 applicable to false statements made to any three branches of the Federal Government. Individuals who knowingly and intentionally deceive or issue fraudulent statements in dealings with any branch of the Federal Government should in my opinion be prosecuted to the fullest extent of the law.

As a former Federal prosecutor in Newark, NJ, I know firsthand the importance of section 1001 of title 18. In my opinion, this is a critical provision of law which protects the Federal Government from potential waste, fraud, and abuse.

Mr. Chairman, last November we were elected to serve the American people and not ourselves. Without the protections of section 1001, we have subjected the legislative and judicial branches of the Federal Government to a Pandora's box of potential abuse. For this reason, I applaud this subcommittee for taking swift action on this important matter.

My legislation, if enacted, would restore section 1001 of title 18 to the status quo prior to the *Hubbard* decision. Members of Congress, congressional staff, and those who conduct business with the legislative and judicial branch of government must be held responsible for their actions. I am concerned that without a viable Federal false statement statute, Government officials and others will be able to engage in acts of fraud and misconduct against the legislative and judicial branches of government, without fear of retribution.

Much of the attention surrounding the *Hubbard* decision has focused on the applicability of section 1001 to Members of Congress. Section 1001 in the past has been used to prosecute Members of Congress who lie on their financial disclosure forms, initiate ghost employee schemes, knowingly submit false vouchers, and purchase personal goods and services with taxpayer dollars. Without a viable false statement statute, as H.R. 1678 would maintain, these crimes may very well go unpunished.

I would now like to address an application of section 1001 that may concern some members of this committee and others elsewhere. In *United States* v. *Poindexter,* the Court held that section 1001 was not only applicable to false claims by Members of Congress, but also to false testimony by executive branch officials to Congress. As a member of the Government Reform and Oversight Committee, this application of section 1001 is of critical importance to me.

One of the primary responsibilities of Congress is the oversight of the various functions of the Federal Government. Congress often makes legislative decisions based in part on testimony or information received from the executive branch and nongovernmental witnesses. We generally operate, and rightfully so, on the assumption that the testimony we receive from various Government officials is accurate and truthful. Many would suggest that it's the enforcement mechanism provided by section 1001 of title 18 that ultimately protects the legislative branch from false statements. It is, I believe, for this reason that both Chairman Bill Clinger of the

Government Reform and Oversight Committee and Chairman Floyd Spence of the National Security Committee have cosponsored H.R. 1678.

Nevertheless, I do want to make it clear this morning that the intent of my legislation is not to create a tidal wave of special prosecutor and independent counsel investigations into this administration or any other administration. Rather, the Government Accountability Act is meant to restore and clarify the Federal false statement statute to its pre-*Hubbard* application.

At the same time, I firmly believe that a representative of the executive branch who knowingly and intentionally issues a false or deceptive statement to Congress, that this individual should be charged with an appropriate crime, regardless of his or her political affiliation. I would like to work with this committee in an effort to ensure that this provision of my legislation is not abused by an overzealous U.S. attorney or a partisan committee chairman. I certainly believe that we can reach a resolution on this issue as we proceed through this legislative process.

Some of you may suggest that a law simply criminalizing the falsification of a Member's financial disclosure form would be enough to fill the gap created by the *Hubbard* decision. Some would argue that other criminal statutes, such as perjury, obstruction of justice, and contempt of Congress can protect this institution from unscrupulous administration officials and private citizens. Mr. Chairman, in my opinion, the truth of the matter is that the above provisions are inadequate.

While perjury is often an accompanying charge in false statement cases, it is a much more difficult charge to gain conviction. I am sure that anyone who has had to deal with those statutes knows the difficulty in proving and establishing the elements of a perjury case. A perjury conviction invokes the two-witness rule and demands that the testimony be supported with corroborative evidence. Furthermore, an executive branch official or private citizen must be under oath while issuing a false statement in order to be charged with perjury. Often administration officials are afforded the courtesy of testifying without being sworn in, thus nullifying the use of a perjury charge.

Contempt of Congress is certainly a viable charge for those who mislead the legislative branch. However, contempt is only a misdemeanor crime which carries a maximum penalty of up to a 1 year prison term. I, for one, do not believe that exposure to a misdemeanor prosecution alone provides Congress with adequate protection from criminally false statements.

Finally, the obstruction of justice statute was essentially negated in the *Poindexter* decision. The Court held that section 1505 of U.S. Code was not applicable to false or misleading statements to Congress. I would, however, like to note that in *Poindexter* the Court did affirm that section 1001 is the correct statute to provide this protection. The false statement statute has also been used to successfully prosecute private citizens and Presidential appointees who have intentionally lied before congressional panels.

Before I conclude, I would also like to address some of the concerns that may be raised, and I note this morning we have two other witnesses and I'm sure they will raise these concerns, and I

share their concerns, raised by the Criminal Defense Lawyers Association later on in this hearing. I practiced criminal defense work for over 14 years, so I am very sensitive to their concerns and agree in large part with what their concerns are.

While the Government Accountability Act does apply section 1001 to the judicial as well as the legislative branch, it is not intended to be directly applicable to formal courtroom proceedings. Rather, I think certainly I would be open-minded to perfecting language that will address where it would be concerned in the judicial branch of the Government. I think it would be consistent with some of the language that was developed in case law prior to the *Hubbard* decision which pretty much carved out a judicial exemption so that it would not apply to defense lawyers in the process of litigation in courtroom proceedings.

In fact, Federal case law stemming from *Morgan* v. *United States* and *United States* v. *Mayer* has clearly demonstrated that courts have waived the application of section 1001 in matters pertaining to the courtroom. The idea that a criminal defense lawyer would be exposed to indictment for simply defending an unscrupulous client who is advancing a false or fraudulent defense is not the intent of this legislation.

As a former criminal defense lawyer and an assistant U.S. attorney, my goal in applying 1001 to the judicial branch is to provide a penalty for individuals who intentionally and knowingly lie or issue false statements in the context of the administrative duties of the judiciary branch, not its litigation proceedings. I believe these would be appropriate uses of 1001 in the judicial setting.

The American people have demanded a Federal Government that is not above the law. Without section 1001, we will seriously jeopardize the ability of this institution to protect itself from both internal and external fraud. Mr. Chairman, the challenge before this committee is to address this important issue quickly and responsibly. As it stands now, there is a significant change in the law between the pre-*Hubbard* decision and the post-*Hubbard* decision. Again I repeat, the intent of my legislation is to simply amend title 18 in a manner in which the Federal false statement statute would be applied consistent with the precedence established prior to the *Hubbard* decision.

To the extent that some may still be concerned that this legislation would create a potential floodgate of special prosecutor and independent counsel investigations into the executive branch, I certainly would work with this panel to ensure that abuse in this area is prevented.

In closing, I look forward to working with the committee as the Government Accountability Act moves through the legislative process. I again thank the committee for providing me with this opportunity and hope that we can reach a successful resolution that will fill the gap that has been created by the *Hubbard* decision.

Thank you very much, Mr. Chairman, distinguished members.

[The prepared statement of Mr. Martini follows:]

PREPARED STATEMENT OF HON. WILLIAM J. MARTINI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Before I begin, I want to thank Chairman McCollum as well as the other Members of the Subcommittee for providing me with the opportunity to testify before you today.

I would like to start by simply reciting Section 1001 of 18 U.S. code.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined $250,000 ($500,000 for organizations) or imprisoned not more than five years or both."

The question before us today, is whether or not individuals who knowingly and intentionally issue a fraudulent or false statement to the Legislative or Judicial Branch of the Federal Government should be subject to criminal prosecution under Title 18 Section 1001 of U.S. Code.

The legislation I am proposing, the Government Accountability Act (H.R. 1678), is intended to amend Section 1001 in such a manner as to make its application consistent with the legal precedents established prior to the recent Supreme Court decision in *Hubbard* v. *United States.*

Under the *Hubbard* decision, Section 1001 of 18 U.S. Code is now only applicable to individuals who knowingly issue a false statement to the Executive Branch of the Federal Government.

The Court has ruled that false statements made by individuals to the Legislative or Judicial branch of government can no longer be prosecuted under Section 1001.

This holding was contrary to forty years of legal precedent established by a 1955 ruling in *Bramblett* v. *United States.*

Bramblett was a former Congressman who was convicted of orchestrating a ghost employee scheme. In this case, the Court held that Bramblett had, "falsely and fraudulently represented to the Disbursing Office of the House of Representatives that a named women was entitled to compensation as his official clerk."

In *Bramblett,* a lower court found that the false statement statute, "was meant to describe the executive, legislative, and judicial branches of the Government." Thus, persons who made false statements to the Legislative Branch could be prosecuted under Section 1001.

In *Hubbard,* the Supreme Court held that, "a court is neither a 'department' nor an agency within the meaning of Section 1001." This clearly infers that Congress is certainly not an agency or department of the Executive Branch. In fact, a lower court has recently used Hubbard to overturn the conviction of a former HUD official (Deborah Dean) who lied to Congress.

In an effort to clarify the existing law, I have introduced the Government Accountability Act, H.R. 1678. By Amending Section 1001 of 18 U.S. Code to include the proposed language, the Federal False Statement Statute would apply to all three branches of the Federal Government.

Individuals who knowingly deceive or issue fraudulent statements in dealings with any branch of the federal government should be prosecuted to the fullest extent of the law.

As a former federal prosecutor in Newark, New Jersey, I know firsthand the importance of Section 1001 of 18 U.S. Code. In my opinion, this is a critical provision of law which protects the Federal Government from potential waste, fraud, and abuse.

Mr. Chairman, last November, we were elected to serve the American people, not ourselves. Without the protections of Section 1001 we have subjected the Legislative and Judicial branches of the Federal Government to a Pandora's box of potential abuse.

For this reason, I applaud the Subcommittee for taking swift action on this important matter.

My legislation, if enacted, would restore Section 1001 of 18 U.S. Code to the status quo prior to the *Hubbard* decision.

Members of Congress, Congressional Staff, and those who conduct business with the Legislative and Judicial branch must be held responsible for their actions.

I am afraid that without a viable Federal False Statement Statute government officials and others will be able to engage in acts of fraud and misconduct against the Legislative and Judicial branches of government without fear of retribution.

Mr. Chairman, much of the attention surrounding the *Hubbard* decision has focused on the applicability of Section 1001 to Members of Congress.

Section 1001 has been used to prosecute Members of Congress who lie on their financial disclosure form, initiate ghost employee schemes, knowingly submit false vouchers, and purchase personal goods and services with taxpayer dollars.

Without a viable false statement statute, as H.R. 1678 would maintain, these crimes may very well go unpunished.

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In *United States* v. *Poindexter,* the court held that Section 1001 was not only applicable to false claims by Members of Congress, but also to false testimony by Executive Branch officials to the Congress.

As a Member of the Government Reform and Oversight Committee, this application of Section 1001 is of critical importance to me. One of the primary responsibilities of Congress is the oversight of the various functions of the Federal Government. Congress often makes legislative decisions based in part on testimony or information received from the executive branch and non-governmental witnesses.

We generally operate on the assumption that the testimony we receive from various government officials is accurate and truthful.

Many would suggest that it's the enforcement mechanism provided by Section 1001 of 18 U.S. Code that ultimately protects the legislative branch from false statements.

It is for this reason that both Chairman Bill Clinger of the Government Reform and Oversight Committee and Chairman Floyd Spence of the National Security Committee have cosponsored H.R. 1678.

I want to make it clear that the intent of my legislation is not to create a tidal wave of special prosecutor and independent counsel investigations into the Administration.

Rather, the Government Accountability Act is meant to restore and clarify the Federal False Statement Statute to its *pre-Hubbard* application.

At the same time, I firmly believe that if a representative of the Executive Branch knowingly issues a false or deceptive statement to Congress, that this individual should be charged with an appropriate crime regardless of his or her political affiliation.

I would like to work with the Committee in an effort to ensure that this provision of my legislation is not abused by an overzealous U.S. Attorney or a partisan Committee Chairman. I believe that we can reach a resolution on this issue.

Some of you may suggest that a law simply criminalizing the falsification of a Member's Financial Disclosure Form would be enough to fill the gap created by the Hubbard decision.

Some would argue that other criminal statutes such as Perjury, Obstruction of Justice, and Contempt of Congress can protect this institution from unscrupulous Administration officials and Private Citizens.

Mr. Chairman, the truth of the matter is that the above provisions are in my opinion inadequate.

While perjury is often an accompanying charge in false statement cases, it is a much more difficult charge to gain conviction.

A perjury conviction invokes the two witness rule and demands that the testimony be supported with corroborative evidence. Furthermore, an Executive Branch official or private citizen must be under oath while issuing a false statement in order to be charged with perjury.

Often, Administration Officials are afforded the courtesy of testifying without being sworn in, thus, nullifying the use of a perjury charge.

Contempt of Congress is certainly a viable charge for those who mislead the Legislative Branch. However, contempt is only a misdemeanor crime which carries a maximum penalty of up to a one year prison term.

I for one, do not believe that exposure to a misdemeanor prosecution provides Congress with adequate protection from criminally false statements.

Finally, the Obstruction of Justice statute was essentially negated in the *Poindexter* decision. The court held that Section 1505 of U.S. Code was, "not applicable to false or misleading statements to Congress."

I would, however, like to note that in *Poindexter,* the court did affirm that Section 1001 is the correct statute to provide this protection.

The false statement statute has also been used to successfully prosecute private citizens and Presidential Appointees who have intentionally lied before Congressional panels.

Before I conclude, I would also like to address some of the concerns that may be raised by the Criminal Defense Lawyers Association later on in this hearing.

While, the Government Accountability Act does apply Section 1001 to the Judicial as well as the Legislative Branch, it is not intended to be directly applicable to formal courtroom proceedings.

In fact, federal case law stemming from *Morgan* v. *United States* and United States v. *Mayer* has clearly demonstrated that Courts have waived the application of Section 1001 in matters pertaining to the courtroom.

The idea that a criminal defense lawyer would be exposed to indictment for simply defending an unscrupulous client who is advancing a false or fraudulent defense is not the intent of my legislation.

As a former criminal defense lawyer and an Assistant U.S. Attorney, my goal in applying 1001 to the Judicial branch is to provide a penalty for individuals who may lie or issue false statements in the context of the administrative duties of the Judiciary Branch, not its litigation proceedings.

I believe these would be appropriate uses of 1001 in the Judicial setting.

The American people have demanded a Federal Government that is not above the law. Without Section 1001, we will seriously jeopardize the ability of this institution to protect itself from both internal and external fraud.

Mr. Chairman, the challenge before this committee is to address this important issue quickly and responsibly.

I repeat, the intent of my legislation is to simply amend Title 18 in a manner that the Federal False Statement Statute would be applied consistently as it was prior to the *Hubbard* Decision.

To the extent that some may be concerned that this legislation would create a potential floodgate of special prosecutor and independent counsel investigations into the Executive Branch, I certainly would work with this panel to ensure that abuse in this area is prevented.

In closing, I look forward to working with the Committee as the Government Accountability Act moves through the legislative process.

I, again, thank the committee for providing me with this opportunity, and hope that we can reach a successful resolution that will fill the gap that has been created by the *Hubbard* decision.

I now welcome any questions that you may have.

Mr. MCCOLLUM. Thank you very much for coming here today, Bill, and telling us your thoughts. Thank you very much for introducing the legislation. I think you have probably addressed most of the questions that we would have to ask you, but I am going to pose a little bit of a discussion and see if any of the other members want to as well.

My own judgment on this is that, having read the *Hubbard* case, the Supreme Court was pretty well saying that they don't see why you need this particular type of statute when it comes to dealing with the courts. Now that doesn't mean we don't. It just means that that was their reading. It was as you have read it, I'm sure—quite a little dissertation on that point by the author of the decision. But you have addressed the concern particularly of the defense bar, and I'm sure we're going to have to go in and look at that a little bit.

Have you thought about any other aspect of it? You have mentioned the "administrative function" exception. Could you elaborate a little bit about the effect of *Hubbard* on the courts, and give us any other thoughts about how we might craft something that is careful to not improperly intervene in judicial proceedings. Do you think it's really important that we have this false statement provision apply to the judicial branch at all?

Mr. MARTINI. Mr. Chairman, I can think of a couple of examples that it might be appropriate to. One would be in the certification process of someone who is seeking admission to the bar. There are numerous papers you have to submit and there are letters of recommendation you have to go out and get. Unfortunately, I know of instances of people who have not taken the appropriate test and

have sought to be admitted to the bar and have practiced law illegally. So I certainly think this would be an appropriate application to that type of a circumstance.

I can think of instances in which defendants submit materials to probation officers. It's in a non-sworn-in context. I certainly think it might be applicable in that type of a situation. It has nothing to do with their defense attorney. They oftentimes are doing this while they are on probation and still would be under the jurisdiction of the judicial branch. So those are two ideas that came to my mind.

Once again, I just want to repeat, ensure the defense bar out there as well as this committee that I certainly would look to work with you to elaborate on that aspect of this legislation.

Mr. MCCOLLUM. I appreciate very much your giving us some illustrations because that's the type of thing we need to think about. We need to hear from other people as to what we need to cover with any legislation because if we are going to start making a couple of exemptions, we also need to know in our own minds what they are intending to cover because there seems to me to be quite a range of possibilities out there when you start making any exemptions.

Your proposal is like the original section 1001. It is very broad and very simple. But the Court, as you said, carved out some exceptions in 1001 of its own over the years. As we go back and craft it, I think it would be incumbent on us to make sure that we do the right job legislatively and we don't leave it to the courts to have to create some kind of exceptions.

Coming to the legislative branch——

Mr. MARTINI. Mr. Chairman, just because I think your point is well taken——

Mr. MCCOLLUM. Sure.

Mr. MARTINI [continuing]. Even prior to the *Hubbard,* the Court was obviously sensitive to this judicial concern in the context of court proceedings. Certainly I am as equally concerned as you are about that. So I recognize that that area, judicial branch, probably would have to be addressed with some perfecting language, but I do think it would be applicable to certain situations in the judicial branch over which we should have oversight and concerns about people filing false context and making false statements in a noncourtroom type proceeding, that there would be jurisdiction over.

Once again, I guess for 40 years there was established legal precedent which in my opinion I think 1001 did have a meaningful role for prosecutors, and one which was used in conjunction often with other statutes and was an instrumental tool, I think, in ferreting out fraud and abuse.

Mr. MCCOLLUM. I don't think there's any question we need to come back and do something in this area, but it's just a matter of what. So let me shift you back to the legislative arena, sort of our home port here. The Court really didn't address that. It was obviously a secondary consideration. The primary case considered applied to the judicial branch, but they did not address the legislative branch. That is very clear; they kicked it out.

The witnesses that are going to come—well, at least one of them here today; I'm sure we'll have others later—are suggesting various scenarios where it would not be appropriate to criminalize, or should not be appropriate to criminalize, behavior before Congress or during some of the legislative functions.

One of those was somewhat in contradiction, I think, to a comment you made earlier in your testimony. That regards the normal unsworn witness testimony before a committee such as this one, or in a case where you haven't raised your right hand and said, "I do swear under oath." This particular witness suggests that the reason why you don't want to do that is it would have a chilling effect on people, particularly those coming in from the outside, maybe giving testimony.

On the other hand, I can see where you don't want to have people coming in here telling us false statements, and there ought to be something to discourage it. Do you have a reaction to that?

Mr. MARTINI. Everything that this legislation is seeking to do is obviously consistent with the underlying principles of criminal law, that it be done knowingly and intentionally and with a criminal intent. So we then get into a basis of analysis of facts for individual situations.

The honest or oversight or negligent misstatements certainly in the past probably were not prosecuted. Certainly, I have respect for the good judgment of most of the prosecutors out there and chairmen of various committees that this would fall under. So it would be premised on still establishing intentional and knowingly making these false statements, but I still think it would be important to apply in that context because I could see a range of abuses that could occur that would be intentional and knowing if we did not have it applicable in that kind of a context.

Mr. MCCOLLUM. Let me ask you one last point. I remember before your election to Congress we had a very celebrated case of a Congressman from Idaho who was prosecuted under this statute for financial disclosure issues. One of the issues that he raised, and he was very forceful about this at the time, is that we should not criminalize statements in the financial disclosure form. It should be taken care of in the House as an ethics matter. For use as a part of our system of ethics, we have ways of dealing with Members of Congress who lie on formal forms. You could literally have your seat taken away or your opportunity to be a Member for doing this. Of course, you could be reelected, too, afterwards, and that all gets washed over.

Do you have any feelings one way or the other about the ethics nature of a financial disclosure form and whether Members of Congress should be subjected to criminal sanction, as opposed to the kind of sanctions that our internal House provides for matters of violating ethics?

Mr. MARTINI. Well, I think I do. Oftentimes the prosecution for filing a false financial statement behind the prosecution are things like phantom employees. They are things like exaggerated expenses for your personal gain. So the document itself is the vehicle under the statute by which prosecution can be made.

Now the innocent oversight of failing to include perhaps some holdings of stock, which have no implication of direct wrongdoing

in the capacity of a Congressman, in all likelihood would not warrant prosecution. But a Congressperson who, for instance, has on his payroll a no-show type employee, in my opinion, it's the financial document that often gives rise to his being exposed to prosecution. Without the financial document and the penalty that is attached to that statute, I see that we'd be opening up a whole realm of abuses by unscrupulous Congresspeople.

Mr. MCCOLLUM. I think your point is well made. I asked the question to be provocative, to get exactly that kind of a thought pattern started.

Mr. Scott, we don't have a clock working today, so we are keeping time by the watch. I'm told I went over my 5 minutes, but it was unintentional. Take what time is appropriate, and we're going to all have to go vote in a few minutes.

Mr. SCOTT. That's a false statement, Mr. Chairman.

[Laughter.]

Mr. MCCOLLUM. Not quite. It wasn't intentional.

Mr. SCOTT. I had a couple of questions. We have mentioned the payroll situation. Why couldn't you prosecute that under regular common law fraud? Why would you need a special congressional false statement statute to cover that?

Mr. MARTINI. Well, as is so often the case in criminal law, there may be two or three statutes that would be applicable to a particular fact situation. That's how, in fact, over the years 1001 has often been used in conjunction with false swearing or with perjury, rather, or even obstruction of justice. Then a lot depends on the set of facts that you have and the jury's ultimate decision as to which facts meet the criteria of a particular statute. So I don't think it's a matter of why can't we have the fraud statute and 1001, but sometimes you'd be able to prove the elements of a fraud, which may be more difficult than proving the elements necessary to prove the filing of a false financial statement with criminal intent, which means knowingly and intentionally designed to mislead or misrepresent.

Mr. SCOTT. Well, you have in the statute knowing and willfully falsifies, so you have the criminal intent. Would you want to cover someone who inadvertently files a statement that turns out to be false and did not know it?

Mr. MARTINI. No, certainly not.

Mr. SCOTT. So you'd want the criminal intent part of it?

Mr. MARTINI. I think everything that I have been testifying to here today is on the assumption that we meet the elements to establish criminal liability, which would be knowing and intentional acts to defraud or to misrepresent. So everything that I have testified to is with that assumption.

Mr. SCOTT. So on the payroll situation, the normal Criminal Code would be sufficient?

Mr. MARTINI. Well, once again, I think it would depend on the facts.

Mr. SCOTT. What fact situation would not be covered by the Criminal Code that you would want covered for someone defrauding the Government on a payroll?

Mr. MARTINI. I'm not so sure I understand the question. If it was an inadvertent failure to report or to—I mean an inadvertent fail-

ure to include something on a financial statement, obviously, if there were no other facts to suggest that there was a criminal intent behind that part, none of us would want that type of a situation to be prosecuted criminally, but that often has not been the case in the past. In the cases where this has been used and where there are convictions, there has been a fact pattern which clearly has demonstrated to the satisfaction of a jury that the person was intending to mislead for his own personal gain.

Mr. SCOTT. You are creating a situation where the Criminal Code can cover most of it; a lot of it you don't want covered. There's something in the middle that you want covered that is not presently covered by the Criminal Code. You mentioned payroll as an example. I am having trouble trying to figure out what's in this gray area that we're trying to cover that is not already covered.

Mr. MARTINI. I didn't mention simply payrolls. I mentioned it was in the context of a question dealing with filing of a false financial statement.

Mr. SCOTT. Just the financial statements then? I don't think we file those under oath. Is that right?

Mr. MARTINI. I believe you are right.

Mr. SCOTT. If we filed them under oath, would that cover it?

Mr. MARTINI. If there's a statute which says that's a false—I may be mistaken. I do believe we file the financial disclosure statements—there is some statement in there that this is being filed as an accurate statement. I do not believe it is under oath.

Mr. SCOTT. If we put the statements like that under oath, where we'd have to get it notarized and then file it, would not that be covered if there was a knowing false statement in there?

Mr. MARTINI. I do not believe there's a statute, other than 1001, that would apply to a situation as you are suggesting. This is the statute that in the past had been utilized.

Mr. SCOTT. That's because it is not under oath.

Mr. MARTINI. But even if it's under oath. I don't know what other statute would be applicable even if you made that under oath. That is something that perhaps this committee can look into.

Mr. MCCOLLUM. Mr. Scott, the Chair is not either, but then that is part of our exploration here. We are learning ourselves. Apparently, we have not had others being utilized. Perhaps they exist, but they are not being utilized. There are a lot of things in the cobwebs of the Federal Code, but I'm not aware of it either.

Mr. SCOTT. Mr. Chairman, I think when I started the first bell went off, and the second bell has gone off.

Mr. MCCOLLUM. Well, let me tell you where we are with that, if I might. Your time is up anyway, but we are at the point where I think all the members of this panel want to ask questions of Mr. Martini. However, we are going to get into a procedural voting today, we understand. So what I would suggest is this: we still have, I think, 5 minutes to go. If Mr. Schiff could ask his questions now, then we'll all take a break and see if there's going to be a vote, which I understand there may be.

Mr. SCHIFF. I'll take 1 minute, Mr. Chairman.

Mr. WATT. Mr. Chairman.

Mr. MCCOLLUM. Mr. Watt.

Mr. WATT. I just want to make it clear, it seems to me that Mr. Martini has outlined the issues very well. I would not feel prejudiced—I know he's got plenty to do—I would not feel prejudiced as the only other member of the minority, if you released him.

Mr. MCCOLLUM. I appreciate it, but I believe that there are questions on the other side—unless Mr. Martini's schedule is pressing?

Mr. MARTINI. No, it's not.

Mr. MCCOLLUM. Let's get Mr. Schiff to ask his question. What I am going to suggest again, for those who may be wanting to walk out to vote, is that we all go over there, vote on this one, and see if there's another one immediately after it. If there is, even if we're going to have a series of votes, which aren't going to be 5-minute votes, I suggest that we come back over as soon as that vote commences. I think we could probably complete the questioning of at least this witness if those of you who want to question would come back over at that point.

Mr. Schiff.

Mr. SCHIFF. I'll take about 30 seconds, Mr. Chairman, in view of the vote. I just want to congratulate Congressman Martini, our colleague, for drafting this bill.

I just want to make this point: obviously, as we have already demonstrated, there can be significant debate about exactly what kind of statement should be covered under this proposed legislation, but I think the overall objective that Congressman Martini has is one that we must adopt. That is, there must be parity in terms of statements made to executive agencies, being covered under oath and possible prosecution for false statements, and statements made either to the courts or to Congress.

Now those last two were overruled by the U.S. Supreme Court as they interpreted the legislation recently. Congressman Martini is seeking only to put us back into the situation that legally has existed for many decades under the *Bramblett* decision. I very much support that endeavor.

Thank you, Mr. Chairman.

Mr. MCCOLLUM. Thank you very much, Mr. Schiff.

I think, in light of the time that we have to vote, if we'll do the procedure I suggested, Mr. Martini, you can come back with us in the same fashion. We will be, then, in recess pending that.

Mr. WATT. Mr. Chairman, I still want to make it clear unless Mr. Coble has a question——

Mr. MCCOLLUM. He does.

Mr. WATT [continuing]. If we come back, I will ask questions, but I will not feel prejudiced if the witness wants to be released. I just wanted to make that comment on the record.

[Recess.]

Mr. MCCOLLUM. The Subcommittee on Crime will come to order.

Mr. Coble, you are up at the batter's box.

Mr. COBLE. Thank you, Mr. Chairman.

I say to the gentleman from New Jersey, it's good to have you with us today.

Mr. MARTINI. It's nice to be here.

Mr. COBLE. Bill, let me read a portion of a letter that you sent to us dated May 25, 1995. "Without the enforcement provision of section 1001, Members of Congress, Federal judges, and contractors

of the judicial and legislative branch will be able to knowingly defraud the Federal Government without fear of punishment. Congress must act swiftly to restore this important protection."

Now I am not necessarily challenging, Bill, the validity of this, but would they, indeed, be able to defraud the Federal Government without fear of punishment? It seems to me that there would be other statutes, Mr. Chairman, available to address, if not resolve, these problems. Am I missing something here? I guess what I'm saying is, is 1001 the exclusive remedy?

Mr. MARTINI. No, Howard, I don't think it's the exclusive remedy. As I said already, I know, for instance, oftentimes a prosecution will develop and result in an indictment that might include perjury, if it's false statements, a violation of 1001. I guess, inherently, you could also include fraud, but each one of those has different elements to establish and prove beyond a reasonable doubt. Oftentimes facts might apply and a jury might be convinced beyond a reasonable doubt, but the facts fit the elements of 1001 and not the elements of perjury or not the elements of a fraud statute, but I think we're all at a little bit of a disadvantage.

I'm not so sure what Federal fraud statute, if there is one, would apply to facts such as the ones we are concerned about here. That is something that certainly I'd be more interested in pursuing and finding out, what other Federal fraud statutes, if there are any. Because in my experience, and I'm really talking about as an attorney and also as a former prosecutor, the statute that was most commonly used was either perjury or a violation of title 18, 1001.

Mr. COBLE. Well, permit me to pursue a simplistic course here, Mr. Chairman, just for the purposes of illumination. Bill, how about you giving us a hypothetical situation that would not be resolved presently, in light of the recent Supreme Court decision, that would in turn be resolved if your bill is enacted.

Mr. MARTINI. I think probably the easiest one and the most obvious one is a Member of Congress who files a financial statement which includes on there the name of an employee that is on his payroll but——

Mr. COBLE. A ghost employee.

Mr. MARTINI. Yes, a ghost employee. That employee is not rendering any services to his congressional duties or, on the other hand, is rendering personal services to himself. Unfortunately, we know of experiences where that has occurred. Now without 1001, I am not so sure what, if any, Federal statute would apply easily—not easily, but would apply appropriately—to that fact pattern.

Now when you speak about fraud, you generally are talking in the context oftentimes that is utilizing a conspiracy to defraud. There's usually more than one person. So it's oftentimes a much more complicated fact pattern. But, once again, I think I certainly would welcome any input from staff or Members here on other potential statutes that would apply, but I think 1001 over 40 years was the statute that was utilized by prosecutors to address a lot of these types of fact patterns.

Mr. COBLE. Mr. Chairman, this may well be an area of the law that needs thorough investigation. This may be the bill that will permit us to keep that door ajar for the purpose of doing that. I thank you, Mr. Chairman. I thank you, Bill.

Mr. MARTINI. Thank you.

Mr. MCCOLLUM. Thank you very much, Mr. Coble.

Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I want to express my thanks to Congressman Martini for bringing this issue forward, one that I start with really no preconceptions about it. It does seem to be an area where a gap has been left. If we can draw the proper balance about where in the legislative branch and where in the judicial branch, if at all, some statutory provision ought to apply, I certainly would support the proposition that the legislative and judicial branch should not be exempt just because they are separate branches.

Having said that, I am worried, I guess, about some of the same concerns that Mr. Scott started to raise. I am not sure that we need a statute in areas where there is already coverage of some kind, just to say that we have a statute. If there's a statute, even though it's not this exact language, or if there is a body of law, even though it's not this exact language, then I'm not sure I understand why we want to duplicate.

So I want to go back to one of the comments you made in answers to questions that Mr. McCollum was raising. I think you raised two situations in the court setting that I wanted to explore with you a little bit. One of those was certifications for the purpose of obtaining a bar license or a license to practice law, for example. The other was certifications in connection with probation or things of that kind.

It was my impression that in both of those cases there are existing statutes or bodies of law or remedies that would be available. I could be mistaken about that. Is it not your impression that one could be prosecuted criminally under any statute for providing false information in connection with an application to become a lawyer, for example?

Mr. MARTINI. Off the top of my head, I couldn't answer that definitively. I don't know if there is any other specific statute that goes specifically to that type of situation. It addresses the one who provides false information in the context of applying for the bar.

Mr. WATT. It's probably unfair to get that specific in the questions. Let me ask it on a more general philosophical basis. If there are other criminal sanctions available under other statutory provisions, would you still see the need to have a duplicative, in effect, criminal statute such as the one you have proposed? Is there some policy justification or is there a need as you see it to have a duplicative kind of statute?

Mr. MARTINI. Let me reiterate something I think I mentioned, but I think it's important. In my reading of the *Hubbard* decision, the Supreme Court decision was based primarily on their analysis of the plain meaning of the words of the statute. They did not make a policy decision, nor is there language in there which would suggest it is inappropriate that 1001 applies to the legislative branch.

Now as to the judicial branch, I think there are different arguments that can be made based on the language in that decision, and I even see distinctions between the two. I think we have to tread, if at all into the judicial branch, very carefully. In the mo-

ments we have had here this morning the chairman asked me a question. Those were two that came to mind where I think it may apply, but I think in my answer I am even suggesting, as well as most of you are, that in that area we would have to be very careful as to what circumstances it would apply in the judicial branch of the Government. Certainly, once again, I would welcome participation on that. I am clearly suggesting we probably would need perfecting language when we speak about what areas of the judicial branch should this apply to.

On the other hand, in the legislative branch I am fairly confident that there is no other statute that would cover many of the fact patterns, that for 40 years prosecutors throughout the country have found title 18, 1001, to be a very useful tool in their overall investigations of public corruption.

Had there been another statute, I think we would have—these cases would be referring to it. The only other one that they constantly refer to is perjury, but that applies only for false statements made under oath. The elements proving perjury are far more difficult.

So I think when it comes to the legislative branch, to answer your question, this is very applicable. We have 40 years of legal precedent, which most people I think would agree, and the public particularly, feel served us well in ferreting out fraud and misrepresentations.

In the judicial area, I reaffirm my commitment as well, to tread very carefully.

Mr. MCCOLLUM. Mr. Watt, the light is not working. We tried it again, but your time is up. We've been counting it. We've got a defective product up here.

Mr. Bryant.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman.

Mr. Martini, I'd like to commend you and welcome you to this committee. I appreciate very much your outstanding work as a freshman colleague of mine. I am proud to join in with you in supporting a measure that I think will correct this, as Mr. Watt said, a gap that's presently existing in the law. I have just a couple of questions I might follow up.

I am wondering, what effect would your legislation have on any pending indictments under section 1001?

Mr. MARTINI. I'll try to talk as a Congressman, not as a lawyer. But in my opinion, I don't think it would—I think counsel for defendants presently under indictment would have an appropriate motion to make under the recent *Hubbard* case. This legislation would have no impact on that. I think any pending indictments would be subject to the pending law. That is the *Hubbard* decision. Whatever remedies are released, they'd be entitled to under the *Hubbard* decision, is what I think the courts would grant them.

Mr. BRYANT of Tennessee. Would your bill fall into the category of something in the nature of ex post facto laws in terms of cases that exist today that are not advanced to trial? In other words, that have not been indicted, have not been charged; that are not in the pipeline?

Mr. MARTINI. I think that's another very interesting question. That is one of the reasons why I think it is very important that

we on this committee and the full committee and then the Congress move on this as quickly as possible.

Some of the information I am receiving from U.S. attorneys who have contacted me is their concern that now under the *Hubbard* decision there is some indecision on their part and some uncertainty on matters that they see coming up of potential investigation, as to whether or not they will have access to title 1001 as one of their statutes under which they can pursue investigations. So it could create a potential problem in the future.

So there's this uncertainty out there now. Under the present law, under *Hubbard*, the prosecutors, the U.S. attorneys out there would be precluded from bringing an indictment against a Member of Congress right now under this statute who were to intentionally, knowingly file a false statement. So I think there's a need to move somewhat expeditiously and carefully, but to address that gap in the law right now.

Mr. BRYANT of Tennessee. I think it's important that as a Congress we take those steps as many of us campaigned on, and we made the commitment I think the first day after we were sworn in to bring Congress in compliance with the laws that all other Americans face, and certainly, as has been editorialized here in D.C., there is a great amount of support, that your bill does exactly that. It holds us to the same standard that American citizens, the regular citizens, are held to. I think it follows that example that we are trying to set.

The other thing, I guess the other concern I have heard I guess for the first time this morning, and maybe you can allay my fears somewhat on this more—and I'm sure we'll hear more about this later from other witnesses—is the possibility that this bill somehow would chill a criminal defendant's right to prosecution or ability to get a good defense lawyer for his defense in trial. I'm not sure I understand that. You alluded to it earlier, about maybe the statements that a lawyer might make during the course of a trial might be somehow subject to this?

Mr. MARTINI. I think the concern of the defense bar is, when you just have language in the statute that says false statements made to the judicial branch, that rightfully—and I agree with their concern here—that in the context of the adversarial litigation proceeding, where a defense lawyer could be representing a defendant, and the defendant is advancing a false defense or misleading, and the defense lawyer may not even know it, could the defense lawyer somehow be subjected to a prosecution under this title 1001. That is not the intent of this.

In the context of litigation, I do think there are sufficient remedies to address intentional misleading by lawyers or defendants, perjury, obstruction of justice, contempt of court. In the past, in the 40 years that this statute has been used, the courts carefully carved out an exception with which I agree. It is called the judicial exemption exception. They enumerate instances like this that 1001 would not be applicable to. Really, that's why I said repeatedly in my testimony what we are trying to do is restore the statute to the status that it was utilized—in the manner it was utilized prior to *Hubbard*. That would include, in my opinion, exceptions, judicial exceptions, that case law prior to *Hubbard* had.

So I think the long and short of it is: ask the judicial branch. We would need some perfecting language which I'm more than interested in working with you and staff to do that, protect against those inequities and potential abuses.

Mr. MCCOLLUM. Well, Mr. Bryant, we've been playing with this light. We think it worked this time. We timed it, and it worked for a change.

Mr. WATT. I think that light works only against people who have the intent.

Mr. MCCOLLUM. Maybe that's it.

Mr. Chabot.

Mr. CHABOT. Thank you very much, Mr. Chairman. I'd like to also thank and welcome Mr. Martini for being here this morning and for the excellent work that he has put into this area, and how quickly he acted upon this decision being released.

The question that I have relates to the relationship between the branches of the Government, particularly the executive branch and the legislative branch in this area. Let me do this by way of an example. Recently we received a budget from the President that allegedly balanced the budget over a 10-year period of time. We then, subsequently, learned that the Office of Management and Budget, the OMB, had cooked the numbers and that, in fact, the President's budget would continue to be out of balance by $200 billion a year. So, in essence, I think Congress had been misled.

Is there a potential for prosection of staff or others for giving us information that they say is one thing; it turns out to be something entirely different? Would you like to comment on that? Perhaps you wouldn't like to comment on that, but would you comment on that?

Mr. MARTINI. Under that standard, Steve, we'd be prosecuting a lot of people over the last 40 years, I think. No, that is clearly not the intent of this, nor would it be appropriate.

Once again, the facts would have to fit the elements of even this crime. You would have to have an intentional, knowing falsity, and material of fact.

As you well know, with budgets and things, they are certified by different groups and under different standards. So it would not apply there. Nobody in the past, from the language of the cases that I have had a chance to read—and I wish I had even more time to do a more indepth analysis of all the cases here, but I have had a chance to read some of them—none of them under the fact patterns I have read come anywhere close to that type of thing between the two bodies in general in the budgets and things like that, nothing like that. Once again, it's all with criminal intent.

Mr. CHABOT. In addition, this would, I assume, cover both testimony at hearings like this where someone comes before us—would it also include written communications that we would receive from other sources?

Mr. MARTINI. Sure. Once again, we are changing nothing else in the statute. No other words are being changed other than deleting any department or agency of the United States and replacing that language with the judicial—executive, judicial and legislative branches of the United States.

So the problem with this statute under the *Hubbard* decision was they read that any department or agency, their meanings of

those words would mean only in the executive branch. There are no "departments or agencies" of the judicial branch, because *Hubbard*, the fact pattern there was someone who filed false statements in a bankruptcy proceeding and he was prosecuted under this statute.

In my opinion, that should not have come up, even under this potentially new statute. That's a separate entity and something else that he could be prosecuted for. But that is solely what we are trying to do, replace that to make it applicable not just to false statements to the executive branch, because—I think it was—Mr. Schiff's point is well taken. This is saying the legislative branch and false statements to the legislative branch should be on parity.

People who come to the legislative branch and make false statements with a knowing and intentional design to criminally misrepresent should be subject to prosecution the same way someone who would go before an executive agency and make that type of statement is now. As we sit here today, the same person can go to HUD, make a false statement, be prosecuted under 1001, but he can come right here to a congressional panel and make the same statement, but he would be precluded under *Hubbard* now from being prosecuted.

Mr. CHABOT. Again, I commend you for your work in this area. I yield back the balance of my time.

Mr. MCCOLLUM. Thank you very much, Mr. Chabot.

I believe we have had all the questions that we've got up here for you today, Mr. Martini, but, again, we want to thank you, Bill, for coming, for introducing the legislation in the first place, creating the initiative. We definitely must address this. The sooner we can get to it, the better.

But it's obvious we're going to have to track through some research here. We have asked the Justice Department for their opinions. They have not yet gotten them together for us. We have gotten some outside experts. We will have our own staff doing research. Many of the questions raised today over the next few weeks we'll have answers to, and as quickly as we can we're going to pass a bill that addresses the concerns that you have expressed. But thank you very much for starting this off.

Mr. MARTINI. Thank you, Mr. Chairman. I thank all the members of the committee for their interest. Thank you very much.

Mr. WATT. Can I ask a question?

Mr. MCCOLLUM. Mr. Watt, yes.

Mr. WATT. How does a gentleman like this, who obviously believes in the value of the legal process and the value of words, not get appointed to the Judiciary Committee? I am just wondering whether I might be able to trade a couple of our nonlawyers here.

Mr. MCCOLLUM. We can always have Mr. Martini over any time he wants to come; that's for certain. Thank you again. We really appreciate it.

I'd like to welcome our second panel today. If each of them would come up as they are introduced, we'll have a place for them. Our first witness is Tim Flanigan, counsel with the law firm of Jones, Day, Reavis & Pogue and former Assistant Attorney General for the Office of Legal Counsel of the U.S. Department of Justice. The Office of Legal Counsel is recognized as the legal advisor of last re-

sort within the executive branch on legal issues ranging from matters involving the separation of powers to interpretation of complex statutes. Prior to joining the Office of Legal Counsel, Mr. Flanigan was in private practice on Wall Street. In 1985, he had the honor of serving as senior law clerk and special assistant to Chief Justice Warren Burger on the U.S. Supreme Court. Mr. Flanigan currently resides in Great Falls, VA, with his wife Kathryn and their 14—it says here 14 children. Do you have 14 children, Mr. Flanigan?

Mr. FLANIGAN. That is correct, Mr. Chairman.

Mr. MCCOLLUM. Wow. I have three, and I think that's a handful. 14 is something else.

Mr. FLANIGAN. In my experience, three was a handful.

Mr. MCCOLLUM. And 14 is more than a handful.

Mr. WATT. Judge—he had 11.

Mr. MCCOLLUM. He had 11? I didn't realize that. We would have announced that, too.

Mr. FLANIGAN. That's a good start on a family, Mr. Chairman.

Mr. MCCOLLUM. Our second witness is Gerald Goldstein, president of the National Association of Criminal Defense Lawyers. Mr. Goldstein is a graduate of the University of Texas School of Law and has devoted his career to the representation of those accused of committing a crime.

In addition to his practice at Goldstein, Goldstein & Hilley, he has served as an adjunct professor of advanced criminal procedure at his alma mater. He lectures frequently on both substantive criminal law and criminal procedures at continuing legal education seminars throughout the United States.

Mr. Goldstein has also served as president of the Texas Association of Criminal Defense Lawyers and is a fellow in the American College of Trial Lawyers.

I assume you don't have 14 children, Mr. Goldstein.

Mr. GOLDSTEIN. I do not. I have only one, a 5-year-old, after 26 years of marriage. I am duly impressed with brother Tim.

Mr. MCCOLLUM. We all are. We're going to go in the order of the introduction. Mr. Flanigan, if you could please give us your thoughts.

STATEMENT OF TIMOTHY F. FLANIGAN, COUNSEL, JONES, DAY, REAVIS & POGUE

Mr. FLANIGAN. Thank you, Mr. Chairman. Thank you for the opportunity to appear before you today.

As I understand it, the purpose of H.R. 1678 is to overturn by legislation the Supreme Court's recent decision in *Hubbard* against the *United States*. In that case the court held that the false statement prohibitions of 18 U.S.C. 1001 do not apply to statements made to the judicial branch. By extension of the Court's reasoning, they would not apply to statements made to the legislative branch either.

H.R. 1678 is a very straightforward attempt to overturn this decision by legislation by simply substituting for the words department or agency, the words "the executive, legislative or judicial branch, or any department or agency thereof."

Let me say at the outset that I think that the Court got it right in *Hubbard*. That's sort of beside the point today, since we're not

going to undo that decision. But I think that those words, "any executive department or agency," are not in their normal and usual usage intended or taken to refer to Congress or to the courts, nor does the definition of either term, "department or agency," contained in section 6 of title 18 require a different result.

Having said that, let me also say—and I hope it is not inconsistent—that I agree with the sponsors of H.R. 1678 that some change is, in fact, necessary to the law as a result of the *Hubbard* decision. The laudable and primary focus of H.R. 1678 is to provide for punishment of officers and employees of the legislative and judicial branches who make false statements in their required public disclosures. Plainly, it will not do to permit legislative or judicial officers or employees to lie with impunity, for example, on financial disclosure forms. Correction of this problem is, as I understand it, the primary purpose of H.R. 1678.

Now on a superficial level, I think we might all say that the most logical response to the *Hubbard* decision would be simply to change the language of the statute to make it applicable to all false statements, including those to Congress and the courts. No one disputes that lying is wrong and, more particularly, wrong in the context of our legislative and judicial processes.

That being the case, what could possibly be wrong with criminalizing false statements to Congress and the courts? The matter is not, however, as straightforward as it might initially appear. The broad scope of section 1001 poses dangers that are not apparent at first glance and requires that Congress be cautious in defining its applicability. The essence of this danger, in my view, lies in the potential chilling of otherwise legitimate conduct by the threat of criminal prosecution, and by creating traps for the unwary.

Now I am going to skip over a focus on the effect of the amendment to 1001, H.R. 1678, on false statements to the courts, because I understand from my review of Mr. Goldstein's testimony that he has very adequately covered those dangers. Let me skip and focus instead on the effect on statements made to Congress.

Read literally, H.R. 1678 in section 1001 would criminalize a broad range of statements to Congress, its committees, and even its Members. Such a rigorous reading of 1001 would criminalize or at least blur the legality of accepted lobbying activities. Consider for example the following: a lobbyist while in conversation with a staff members makes a knowing misstatement regarding the level of political support underlying a particular legislative proposal. It later appears that the misstatement was material to the outcome of the legislative process. Has the lobbyist committed a violation of 1001? In my view, no. I think a commonsense view says no also. At most, she has engaged in what we commonly refer to in Washington as "blathering." Actually, there are other words for it, but this is on the record; I won't use them.

Contrast that example with the following: a witness who, having been duly sworn, knowingly gives false testimony before a congressional committee. Few would doubt that the latter individual should be published.

The first amendment's guarantee of the right to petition government for redress of grievances argues for great caution in criminalizing unsworn statements to Congress. As the Supreme Court has

noted in another context, any lobbyist or applicant in addition to getting himself heard, seeks by procedural and other means to get his opponents ignored. Such activity is clearly protected under the first amendment. Nevertheless, such actions could, in some circumstances, be construed by a zealous prosecutor to constitute efforts to conceal within the meaning of 1001, material facts.

Unsworn testimony such as that I give today could be chilled by the knowledge that any statement could expose the witness to criminal liability. In today's Washington, a potential witness may not doubt that the full measure of a statute might be brought down against him by those who disagree with his position. Indeed, the independent counsel investigation leading to the Supreme Court's decision in *Morrison* v. *Olson* concerned whether a Justice Department official's unsworn testimony before a congressional committee violated section 1001.

It may be argued that the potential chilling effects I have noted are unlikely to follow from the enactment of H.R. 1678 because the bill merely restores the law as it was thought to exist prior to the *Hubbard* decision. This argument is not persuasive for several reasons. Most importantly, the defects I have outlined above are inherent in the broad language of 1001 itself. Since we're on the topic, there's no reason not to address those defects at this time. Moreover, it is important to understand that prior to *Hubbard* there existed considerable uncertainty among prosecutors as to the scope of 1001. This uncertainty led most prosecutors to proceed cautiously in cases under that section.

Finally, let me address some of the drafting issues that I feel the committee will face in crafting a response to the *Hubbard* decision. Although *Hubbard* purports to address only 1001, it may be that the Court's reading of that section will have a profound effect on other statutes as well. Other sections of our Federal criminal laws use language identical to that found in section 1001. For example, 18 U.S.C., section 654 uses the phrase, "any department or agency" of the United States to define those subject to punishment under that section for stealing Federal money or property. Similarly, 18 U.S.C. 643 uses the same phrase to define the scope of prohibition against retaining unauthorized funds.

I am also informed, and I confess I have not checked this, that even the antilobbying act provisions use the phrase "any department or agency of the United States." The application of these sections to Congress and the Court should be clarified. A careful reading of the *Hubbard* opinion leads to the conclusion that this subcommittee should not limit its focus to section 1001.

One other section of particular relevance is the definitional section I referred to earlier, section 6. That section defines the terms "department" and "agency." The Supreme Court looked to that section to determine the meaning of those terms in 1001. That section provides in pertinent part as follows: as used in this title, title 18, the term department means one of the executive departments enumerated in section 1, since renumbered section 101, of title 5, unless the context shows that such term was intended to describe the executive, legislative or judicial branches of the Government.

Mr. Chairman, every time that I have had occasion to review that statute I have been struck by the poor quality of its drafting.

I am certain, I hope at least, that a first-year associate of my law firm would know better than to draft a legal document that contained such a breezy and open-ended definition as that used in section 6. Indeed, that definition in its reference to context arguably doesn't define anything at all. Instead, it merely invites questions as to the meaning of the phrase in each section in which it is used. This lack of clarity is particularly troubling in the context of a criminal statute, which I think we would all agree ought to give fair warning as to the nature of the prescribed conduct.

Because of the potential effect of *Hubbard* on other sections as described above, I recommend that this subcommittee undertake to review not just 1001, but each use of the phrase in title 18, and, for that matter, in the criminal provisions of title 50, U.S. Code. The purpose of this review should be to determine in each case whether the statute should apply to all three branches of government.

In conducting that review, may I suggest the following principles: first, to the maximum extent possible, conduct prohibited by officers or employees of one branch should also be prohibited to the others. The rule of law which underlies our democracy requires that no person be immune from its strictures.

Second, you may wish to avoid prohibitions which will be subject to abuse by adverse parties. We simply do not need another bloody shirt to be waved at the press and public by adverse litigants and adversaries in the political process.

Finally, I hope that you will avoid creating broad rules which will chill the exercise of rights protected under the first amendment. Thank you.

[The prepared statement of Mr. Flanigan follows:]

PREPARED STATEMENT OF TIMOTHY E. FLANIGAN, COUNSEL, JONES, DAY, REAVIS & POGUE

Mr. Chairman and Members of the Subcommittee, I am honored to appear before you this morning to testify concerning H.R. 1678, the Government Accountability Act. The purpose of this bill is, as I understand it, to overturn by legislation the Supreme Court's recent decision in *Hubbard* v. *United States*. In that case, the Supreme held that the "false statement" prohibitions of 18 U.S.C. 1001 do not apply to statements made to the judicial branch. The reasoning of the opinion also makes clear the Court's view that 1001 does not apply to statements made to Congress.

H.R. 1678 is a straight forward attempt to overturn the *Hubbard* decision by substituting the words "the executive, legislative, or judicial branch, or any department or agency thereof" for the words "department or agency" currently found in the statute.

Let me say at the outset that I believe that *Hubbard* was a correct interpretation of 1001 as that section currently reads. The Court held, correctly in my view, that the words "department or agency" as used in 18 U.S.C. do not include the judicial or, for that matter, the legislative branches of government. The ordinary use of those terms does not include the Legislative or Judicial Branches. Nor does the definition contained in 6 of Title 18 require a different result.

It is not inconsistent to say that I also agree with the sponsors of H.R. 1678 that some change in the law is needed to fill gaps created by the Court's interpretation of 1001. The laudable and primary focus of H.R. 1678 is to provide a punishment for officers and employees of the Legislative and Judicial Branches who make false statements in their required public disclosures. Plainly it will not do to permit legislative or judicial officers and employees to lie with impunity, for example on financial disclosure forms. The correction of this problem is, as I understand the primary purpose behind H.R. 1678.

On a superficial level, the most sensible response to *Hubbard* would be to amend 1001 to make it applicable to all false statements to Congress and the courts. Who would dispute that lying is wrong generally and particularly in the context of our

most important governmental processes? That being the case, what could be wrong with criminalizing false statements to Congress and the courts?

The matter is not, however, as straight forward as it might initially appear. The broad scope of 1001 poses dangers not apparent at first glance, and requires that Congress be cautious in defining its applicability. The essence of this danger lies in chilling otherwise legitimate conduct by the threat of criminal prosecution and in creating traps for the unwary.

This is perhaps most easily seen in the judicial context. There, a rigorous application of 1001 could have a substantial detrimental effect on the adversarial process. In the heat of litigation, it is all too common for a lawyer or litigant to view statements made by an opposing party or lawyer as not merely incorrect but also false.

Of course, section 1001 prohibits not merely false statements, but statements that "conceal" or "cover up" material facts. In a hotly contested litigation, it may be tempting for a party to characterize a trial tactic as a violation of a federal criminal law.[1]

Even if § 1001 were applied only where a litigant could be said to have a duty to disclose so that it would not apply to legitimate trial tactics—a limitation that is not apparent on the face of the statute—the threat of prosecution for such tactics would remain a powerful tool in the hands of prosecutors.[2]

Read literally, § 1001 and H.R. 1678 would criminalize a broad range of statements to Congress, its committees and subcommittees and even to individual members and staff. Such a rigorous reading of § 1001 would criminalize, or at least blur the legality of, accepted lobbying activities.

Consider the following example: A lobbyist while in conversation with a staff member makes a knowing misstatement regarding the level of political support for legislative proposal. If it later appeared that the misstatement was material to the ultimate outcome of the legislative process, has the lobbyist committed a violation of § 1001? Or has she instead simply engaged in that most common of Washington pastimes, the act of blathering?

Contrast this example with the case of a witness who, having been duly sworn, knowing gives false testimony before a congressional committee. Few would doubt that the latter individual should be punished.

The First Amendment's guarantee of the right to petition government for redress of grievances argues for great caution in criminalizing unsworn statements to Congress. As the Supreme Court noted in another context—refusing to apply antitrust laws to lobbying activities—"[a]ny lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponents ignored."[3] Such activity is clearly protected under the First Amendment. Nevertheless, such actions could, in some circumstances, be construed by a zealous prosecutor to constitute efforts to "conceal" material facts under a rigorous reading of § 1001.

Unsworn testimony, such as that I give today, could be chilled by the knowledge that any statement could expose the witness to criminal liability. In today's Washington, a potential witness may not doubt that the full measure of the statute might be brought down upon him by those who disagree with his position. Indeed, the independent counsel investigation leading to the Supreme Court's decision in *Morrison* v. *Olson*[4] concerned whether a Justice Department official's unsworn testimony before a congressional committee violated § 1001.

It may be argued that the potential chilling effects I have noted are unlikely to follow from the enactment of H.R. 1678, because that bill merely attempts to restore the law as it was thought to exist prior to the Supreme Court's *Hubbard* decision. This argument is not persuasive for several reasons. Most importantly, the defects I have outlined above are inherent in the broad language of § 1001 itself and there is no reason not to address them in the context of any legislative response to the *Hubbard* decision. Moreover, it is important to understand that prior to *Hubbard* there existed considerable uncertainty among prosecutors as to the scope of § 1001. This uncertainty led most prosecutors to proceed cautiously in cases under that section.

Finally, let me address some of the drafting issues you must face in crafting a response to *Hubbard*. Although *Hubbard* purports to address only 1001, it is may

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[1] For example, as a federal court of appeals asked more than thirty years ago, "Does an attorney 'cover up' when he moves to exclude hearsay testimony he knows to be true, or when he makes a summation on behalf of a client he knows to be guilty?" *Morgan* v. *United States*, 309 F.2d 234, 237 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 917 (1963).

[2] *See Hubbard* v. *United States*, No. 94–172, slip op. at 2 (1995) (Scalia, J., concurring), and cases cited therein.

[3] *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344, 1355 (1991).

[4] 487 U.S. 654 (1988).

be that the Court's reading of that section will have a profound effect on other statutes as well. Other sections of our federal criminal laws use language identical to the relevant language of § 1001. For example, 18 U.S.C. § 654 uses the phrase "any department of agency" of the United States to define those subject to punishment under that section for stealing federal money or property. Similarly, 18 U.S.C. 643 uses the same phrase to define the scope of prohibition against retaining unauthorized funds. The application of these sections to Congress and the courts should be clarified.

A careful reading of the *Hubbard* opinion leads to the conclusion that this Subcommittee should not limit its focus to 1001. One other section of particular relevance is 18 U.S.C. § 6 which defines the terms "department" and "agency." The Supreme Court looked to that section to determine the meaning of those terms in § 1001. That section provides in pertinent part as follows:

As used in this title:

> The term "department" means one of the executive departments enumerated in section 1 [since renumbered 101] of Title 5, *unless the context shows that such term was intended to describe the executive. legislative or judicial branches of the government.* (Emphasis added.)

Every time I have had occasion to read this definition I have been struck by the poor quality of its drafting. I am certain that a first year associate at my law firm would know better than to draft an legal document using such a breezy and open ended definition of a key term as that used in 6. Indeed, the definition arguably does not "define" anything. Instead, it merely invites questions as to the meaning of the phrase in each section in which it is used. This lack of clarity is particularly lamentable in the context of a criminal statute which should, to the maximum extent possible, be written so as to provide a clear warning of the prohibited conduct.

Because of the potential effect of *Hubbard* on other sections as described above, I recommend that this Subcommittee undertake to review each use of the phrase in the criminal statutes, including those contained in Title 50. The purpose of this review should be to determine in every case whether the statute should apply to all three branches of government.

In conducting that review, I suggest that the Subcommittee take into account the following principles:

First, to the maximum possible, conduct prohibited by officers or employees of one branch should also be prohibited to others. The rule of law which underlies our democracy requires that no person be immune from its strictures.

Second, you should avoid prohibitions which will be subject to abuse by adverse parties. We simply do not need another bloody shirt to be waved at the press and public by adverse litigants and adversaries in the political process.

Finally, you should above all avoid creating broad rules which chill the exercise of rights protected under the First Amendment.

I thank the Chairman and the Members for their attention, and I would be happy to answer any questions you may have.

Mr. MCCOLLUM. Mr. Flanigan, you have given excellent testimony. We really appreciate your contribution, especially the explanation that you have given us. We have got a lot of things to look at.

Mr. Goldstein, we welcome you. Please proceed to give us your thoughts.

STATEMENT OF GERALD H. GOLDSTEIN, PRESIDENT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. GOLDSTEIN. Thank you, Mr. Chairman, distinguished members of this committee. First let me thank you for affording me the opportunity to be here today.

My name is Gerry Goldstein. I am president of the National Association of Criminal Defense Lawyers. I am appearing on behalf of nearly 30,000 lawyers across the country who represent citizens accused of crimes, men and women, private lawyers, public defenders, who strive to vigorously and effectively represent their clients

in accordance with the requirements of the sixth amendment to our Constitution.

I come here to express our collective concern and opposition to House bill 1678 as it is proposed and in its global effect in terms of making false statements in the judicial context a crime.

Let me start, as Mr. Flanigan ably pointed out, there is no question that it is unacceptable for attorneys, prosecutors or defense lawyers, to misrepresent facts or law in court. We are not seeking here a speech-and-debate clause for lawyers in courtrooms, but Federal judges already have full and very effective authority to punish lawyers on both sides. Where lawyers come in and engage in unfair practices, Federal judges have the power and authority to hold them in contempt, to fine them, to jail them, to suspend them from practice, to bar them permanently from practice, and to refer the lawyer to the State bar ethics committees.

But, more importantly, such calls as these should be made by a neutral and detached judicial officer sitting in a position with full knowledge of the circumstances and the effect and impact of any misconduct or misrepresentations in their courtroom. Yet, 1678 will have the effect of divesting Federal judges of the power over their own courtrooms by placing it in the hands of prosecutors, giving them yet another devastating weapon in a growing arsenal; that not only is an effective means of intimidation, but has the effect in many cases of eliminating an adversary's advocate. It renders defense counsel impotent and afraid to vigorously plead his or her client's case, lest they offend an able prosecutor.

I might point out that, by placing such a prosecutorial weapon in the hands of a U.S. attorney, we are giving it to the same Department of Justice lawyers that now claim to be immune from State bar ethical rules and the code of professional responsibility at a time when there are other bills pending in Congress that seek to exempt Federal prosecutors from the effect of State bar ethical rules and codes of professional responsibility across the board.

Imagine this: the Supreme Court has told us, in effect, that you have more rights when it comes to taking away your food stamps under *Goldberg* v. *Kelly* than when they take away your liberty before a Federal grand jury. Federal grand juries—*Williams* v. *United States*—are the exclusive province, the exclusive weapon of Federal prosecutors. As defense lawyers, we are unauthorized persons. It would be illegal for us to stick our nose inside the door, inside a Federal grand jury.

I have to admit I have not agreed with Justice Scalia about much lately, but we agree on what he had to say in the recent Supreme Court case that brought us here today, what he had to say about criminalizing false pleadings and false statements in Federal courts. And I quote from Justice Scalia's opinion in *Hubbard,* "I have serious concerns that even the threat of criminal prosecution under the capricious provisions of such a statute will deter vigorous representation of opposing interests in adversarial litigation." He goes on, and I place particular emphasis, "particularly representation of criminal defendants, whose adversaries," the prosecutors, "control the machinery of such prosecution."

Let me suggest to you that we heed Justice Scalia's warning, that the proposal before you as written would deter the kind of vig-

orous representation that brought us many of the dramatic changes that have altered forever the legal landscape in this country, deter the kind of vigorous representation that brought us *Brown* v. *Board of Education,* that brought us *Roe* v. *Wade,* that brought us *Miranda* v. *Arizona.* It will also deter the kind of vigorous representation by able lawyers, rightly or wrongly, wishing to reverse some of these trends.

If I, as a defense attorney, overstate or misstate the law or facts in a particular case, any prosecutor worth his or her salt could go to his or her grand jury and have me indicted like the proverbial ham sandwich. But if I think a prosecutor lied, do you really think I'd be able to go up to him and say, "Billie Joe Bob, I think you lied in this pleading. Would you mind going back into the secret grand jury and indicting yourself, prosecuting yourself?" It ain't going to happen.

It is one thing to hope that lawyers will be courageous in their defense of others. It is yet another to ask us to fight zealously for the rights of our clients in a system where our own reputations, our own livelihoods and our own freedom would hinge upon the discretion of our Government adversaries. If it were so, who will stand up and challenge the Government?

Thank you, Mr. Chairman.

[The prepared statement of Mr. Goldstein follows:]

PREPARED STATEMENT OF GERALD H. GOLDSTEIN, PRESIDENT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. Chairman and members of the Committee, thank you for providing me this opportunity to testify on behalf of the members of the National Association of Criminal Defense Lawyers (NACDL) in opposition to H.R. 1678.

The almost 9,000 direct, and almost 30,000 state and local affiliated members of the National Association of Criminal Defense Lawyers are private defense lawyers, public defenders and law professors. They have devoted their lives to protecting the many provisions of the Bill of Rights concerned with fairness in the criminal justice system. NACDL's interest in, and special qualifications for understanding H.R. 1678 are keen. I am here today to explain why we stand in firm opposition to H.R. 1678.

I. WHERE'S THE PROBLEM?

I think it is important to first ask why H.R. 1678's proposed "remedy" of the Supreme Court's recent *Hubbard* decision is thought warranted.[1] Where is the problem in need of "remedy"?

There is no question that it is unacceptable for attorneys to misrepresent facts or law in court filings. However, under existing rules and procedures, federal judges already have full (and efficient) authority to punish attorneys (from *both* sides) who engage in such unfair practices. A judge who finds attorney misconduct can hold the attorney in contempt of court, and impose a fine or jail term.[2] Or, the judge can suspend the attorney from practicing before the federal courts, or, bar the attorney forever.[3] Finally, the judge can refer the attorney for discipline before the appropriate state board of professional responsibility.[4] Such calls should be made by a *neutral and detached judicial officer,* not one (especially not the already more powerful and monied prosecution) engaged in the adversarial representation of parties in interest. And it is the time-honored trial device of *cross-examination* (overseen by judges according to the rules of procedure) that weeds out in-court falsehoods.

There is no need for H.R. 1678's envisioned expansion of prosecutorial power. This measure would trivialize the federal Criminal Code and grant prosecutors an unfair

[1] *Hubbard* v. *United States,* 115 S.Ct. 1754 (1995).

[2] Rule 42, Federal Rules of Criminal Procedure.

[3] Each federal district court has local rules that typically include ethical standards and procedures for sanctioning attorneys who violate the rules, and these rules typically provide for these types sanctions.

[4] *See e.g., U.S.* v. *Lopez,* 4 F.3d 1455, 1464 (9th Cir. 1993).

advantage over their adversaries. More important, it would do so in a manner divesting a federal judge's power over his or her courtroom and placing an unnecessary weapon in the hands of prosecutors—so that the latter might invoke unreviewable grand jury proceedings against adversaries, bringing justice-thwarting, and docket-clogging, section 1001 indictments against their adversaries to the exclusion of the much more efficient and fair proceedings conducted by the judiciary. In short, the "potential for mischief"[5] inhering in H.R. 1678 cannot be overstated.

II. H.R. 1678 AND "FALSE STATEMENTS" IN JUDICIAL PROCEEDINGS: SILENCING THE ACCUSED; OVER-AGGRANDIZING THE PROSECUTOR

H.R. 1678 seeks to expand the felony scope of 18 U.S.C. section 1001 in the most unfair manner. Its attempted inclusion of "false statements" made in the course of judicial proceedings within the focus of section 1001 would not simply *chill* speech and the accused's right to zealous representation, it would *freeze* these rights out of the courtroom. H.R. 1678 would make a mockery of our constitutionally-insured adversarial system of criminal justice. It would turn the trials of most importance under our Constitution, criminal trials, into mere "show" trials—where the prosecutor reigns supreme, judges are disempowered, and the criminal defense lawyer and the criminal defendant are afraid to plead their cause, lest they offend the all-powerful prosecutor.

In his concurrence in *Hubbard* v. *United States*, 115 S.Ct. 1754, 1765 (1995), Justice Scalia (joined by Justice Kennedy) anticipated quite well precisely what is wrong with the concepts reflected in H.R. 1678:

> There [exists] a serious concern that the *threat* of criminal prosecution under the capricious provisions of section 1001 will deter vigorous representation of opposing interests in adversarial litigation, particularly representation of criminal defendants, whose adversaries control the machinery of section 1001 prosecution. (Emphasis in original.)

And the criminal defense bar knows first hand about such threat posed by all-powerful prosecutors.

Even without the statutory power of H.R. 1678, prosecutors frequently abuse their authority in ways that imply an effort to intimidate their adversaries and eliminate all "opposition" to conviction. H. R. 1678 would open the proverbial floodgates to more of these practices:

> Federal prosecutors in Reno, Nevada recently released a major drug smuggler from jail, allowing him to continue using $10 million in forfeitable drug profits, and promised him leniency at his sentencing, to induce him to testify that his defense attorney, Patrick Hallinan, had joined in his drug conspiracy. There was no evidence to corroborate the testimony purchased against Hallinan, a highly respected attorney and zealous advocate who had handed federal prosecutors several high-profile defeats. Finally, on March 7, 1995, having endured a lengthy investigation and a grueling six week trial, the 60 year old Hallinan was acquitted by a (similarly abused) jury after just 40 minutes of deliberation.[6]
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> Federal prosecutors in Milwaukee, Wisconsin recently initiated a criminal investigation of respected attorney (indeed, former prosecutor) Stephen Kravit, on nothing more than his routine and appropriate representation of a business client suspected of fraud. According to the United States Court of Appeals reviewing the case: "On meager grounds the U.S. Attorney's office launched a sting operation against the lawyer for an individual under criminal investigation by the same office. Although the investigation produced zero evidence or leads to evidence of illegal conduct, it dragged on for two years."[7] In the meantime, the defense attorney was forced to abandon the representation of his client to defend himself.
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> Kent Schaffer, a prominent criminal defense attorney from Houston, Texas, and a member of the NACDL Board of Directors, was recently sued on a trumped up libel charge by an Assistant United States Attorney who was offended by the fact that Mr. Schaffer has been so impertinent as to report the prosecutor's unethical behavior, by confidential letter, to the Department of Jus-

[5] *Hubbard* v. *U.S.*, 115 S.Ct. at 1765 (Scalia, J., concurring).

[6] *See* Rob Hasseler, Jury Acquits Hallinan of All Charges: Prominent S.F. Attorney Cleared Quickly in Drug Case, S.F. Chron., Mar. 8, 1995, at A1.

[7] *United States* v. *Van Engel*, 15 F.3d 623, 629 (7th Cir. 1993).

tice's Office of Professional Responsibility. Fellow NACDL members were called upon to represent Mr. Schaffer, and the case was summarily dismissed.[8]

Under H.R. 1678, defense lawyers and their clients would be placed in a Kafkaesque criminal justice system, under the thumb of the prosecution, threatened with indictment should they be deemed to be "making trouble" for the prosecution through the zealous advocacy that has historically and traditionally typified our justice system, especially our criminal justice system. The mere existence of the expanded section 1001 would thwart vigorous representation of citizens accused, even in circumstances where the particular prosecutor has not threatened his or her adversary and does not intend to use any such overt threat.

It is important to view the bill's proposed expansion of prosecutorial power in the context of the ethical "opt-out" rights now claimed by federal prosecutors. Since at least 1989, the Justice Department (under both Republican and Democratic Administrations) has consistently claimed *its attorneys* are above the ethics laws applicable to all other attorneys.[9] In the 1989 memorandum of then–Attorney General Richard Thornburgh, the Department of Justice claimed that the extent to which federal prosecutors are bound by the ethical rules of the states licensing the lawyers is strictly up to the Department to decide, as a matter of federal executive branch policy. In August 1994, Attorney General Janet Reno codified this view, through a federal regulation. The Reno regulation, like the Thornburgh memorandum before it, asserts that irrespective of the state bar ethics rules supposedly applicable to all lawyers, federal prosecutors can contact and communicate directly with opposing parties they know to be represented by counsel. This regulation also allows federal prosecutors to "interview" employees of corporate targets, outside the presence of the corporation's counsel.[10] Yet, this is the group that H.R. 1678 would allow to "police" its adversaries through felony indictments for making "false statements" during litigation.

III. H.R. 1678 AND THE STAR CHAMBER

About the only precedent in our centuries of legal tradition for the system of criminal "justice" that is envisioned by H.R. 1678 is the spine-chilling "Star Chamber" that was determined to be so offensive to the Founders and the Framers of our Constitution. This notorious and secret tribunal of 16th and 17th century England was used to dispatch the Crown's enemies without any semblance of due process.[11] It was precisely this sort of unfair and totalitarian power in the hands of prosecuting authorities referenced by Justice Scalia in *Hubbard* that the Star Chamber wielded at the expense of the people, and which the Founders sought to prevent from recurring on these shores. Yet H.R. 1678 does not even make the claim of the Star Chamber, that "high state policy" justifies such an inquisitorial criminal law regime.[12]

One unfortunate target of the Star Chamber's inquiries was a Presbyterian named William Prynne. He was accused of publishing seditious pamphlets. Given the Star Chamber's "false pleadings" ban, no lawyer would dare sign pleadings in Prynne's defense. As a result, Prynne found himself standing at the pillory with

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[8] *See* Eva M. Rodriguez, Prosecutor Fights Fire with Fire: Accused of Misconduct, AUSA Sues Defense Lawyer for Libel, Legal Times, Apr. 10, 1995, at 1.

[9] *See* Gerald H. Goldstein, Government Lawyers: Above the Law?, Op-Ed., Wash. Post, May 2, 1995.

[10] The "supremacy" "logic" of the Department's state ethics opt-out claim has been rejected by federal courts considering it, and unanimously condemned (as offensive to the fundamental concept of Federalism) by the 50-state Conference of State Court Chief Justices in a Resolution promulgated earlier this year.

[11] The Star Chamber:

> [t]hat curious institution, which flourished in the late 16th and 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying "political" defenses, the Star Chamber has for centuries symbolized disregard of basic individual rights.

Faretta v. *California*, 422 U.S. 806, 821 (1975). *See also* Professor Lawrence Freedman, A History of American Law 23 (1973):

> The court of star chamber was an efficient, somewhat arbitrary arm of royal power. It was at the height of its career in the days of the Tudor and Stuart kings. Star chamber stood for swiftness and power; it was not a competitor of the common law so much as a limitation on it—a reminder that high state policy could not safely be entrusted to a system so chancy as English law. . . .

See generally also 5 W. Holdsworth, A History of English Law 155–214 (1927).

[12] *See id.*

both his ears cut off and his cheeks branded with the letters "S.L." (for "seditious libeler")—*before beginning his sentence of life imprisonment.*[13]

IV. CONCLUSION

An outstanding analysis on the subject just published by the CATO Institute aptly observes:

> As a federal judge recently noted, "[O]ne of the lawyer's most noble responsibilities is to protect the individual against Government excesses"; in a free society, "[t]he lawyer must stand independently and resolutely when he or she believes the government is wrong. And on occasion it takes great courage." It is one thing to hope lawyers will be courageous; it is quite another to ask them to fight zealously for the rights of their clients in a system where their own reputations, livelihoods, and freedom would hinge on the discretion of their government adversaries. Who will challenge the government then?[14]

H.R. 1678 is deeply misguided and utterly incompatible with our adversarial system of justice and the most fundamental principles of fairness for which our American democracy stands. To again borrow from, and paraphrase the *Hubbard* concurrence penned by Justice Scalia, NACDL urges the Committee to reject outright H.R. 1678 and all that it represents—to immediately "uproot this weed."[15]

Mr. MCCOLLUM. Mr. Goldstein, you are quite welcome. Thank you for bringing that testimony to us. You brought out excellent points. Is there a place for criminalizing a false statement to a court in the exercise of its administrative duties, or is there already a remedy for that, as well as the courtroom?

Mr. GOLDSTEIN. Most of what we are worried about is already amply covered because most of the minions—that is, the agents that work for the Federal Government in terms of investigating and prosecuting crime—are, in fact, part of the executive branch. Every Federal agency that investigates and prosecutes or investigates Federal crime, whether it's the FBI, the DEA, the IRS, the Treasury Department, all of those are part of the executive branch. That is precisely what 1001 covers, and has covered, and will continue to cover even after *Hubbard.*

So that while there may be a dribble here and dribble there when it comes to certain proceedings within the judicial realm, such as an application to apply before a Federal district court, it seems to me that that could be rendered more simply and more precisely with a laser shot than with a broad painting brush; for example, required to be sworn to and filed with the court.

There are lots of ways to get around any concern. Interestingly enough, you'll bump the punishment up for that substantially. Otherwise, it can be treated as a misdemeanor. There's nothing wrong in terms of the application for practice before a district court; you are applying to a district court. I think that judge would have some authority over someone who placed himself within the jurisdiction of the court for that purpose.

Mr. MCCOLLUM. Of course, the court has the contempt powers of certain sorts that it can use more readily than Congress can use its contempt powers. I was thinking of statements, for example, that are given in the context of an immigration matter in the Fed-

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[13] Jarett B. Decker, The 1995 Crime Bills: Is the GOP the Party of Liberty and Limited Government?, Policy Analysis No. 229, at 13 (CATO Inst. Jun. 1, 1995) [hereinafter Decker, Policy Analysis], citing *Faretta* v. *California,* 422 U.S. 806, 823 n.18 (1975) (which quotes J. Stephen, A History of the Criminal Law of England (1883)).

[14] Decker, Policy Analysis, *id.* at 14 (quoting Matter of Doe, 801 F. Supp. 478, 488 (D.N.M. 1992)).

[15] 115 S.Ct. at 1766.

eral court. Of course, all State courts are not covered by this. Perhaps it was some failure on my part to catch that in the previous testimony the author gave. He was giving illustrations. I'm sure he didn't think through some of those, but the bar association applications are probably State law, while immigration would be clearly Federal. On the other hand, I believe what you are saying is that if somebody gives a false statement on an immigration form, that it is being given to the executive branch more often than not.

Mr. GOLDSTEIN. In almost all contexts. By the way, there is an application to apply to be admitted to practice before most Federal courts as well, but it is an application to the court. It could be sworn. It would be covered both by the swearing nature of it being filed in court and by the fact that the court—you are acceding to the court's jurisdiction and the court has contempt power.

But most of the issues like immigration and the other ancillary proceedings would be covered because that is an agency of the executive branch, that is, INS or the Immigration and Naturalization Service, rather than the judicial branch.

Mr. MCCOLLUM. Essentially, what you are saying is you don't believe that we ought to be applying this false statement type of legislation to the court system. You believe that it is unnecessary and that if we do apply it at all, it would have to be very minor, very specifically targeted. Is that the bottom line?

Mr. GOLDSTEIN. Bottom line, laser beam, not a broad brush. The one example I think—and by the way, I welcomed Congressman Martini's sensitivity to our concerns and commend him for that. The area of probation, for example, a statement made to a probation officer who is sort of in limbo, but probably falls under the judicial branch when that statement is being made pursuant to a presentence investigation——

Mr. MCCOLLUM. Something like that might be an example of a case where we might want it.

Mr. GOLDSTEIN. You might, although don't forget that's a pretty touchy-feely area, where there's an ax about to fall on someone's head. There's a lot that someone can do in terms of a false statement that's made to a probation officer because you're about to go before a judge that, even with the sentencing guidelines, exercises considerable discretion with respect to false statements that might be made. The guidelines even have their own provision for individuals who make false statements in the process of that proceeding. So that there's ample room for punishment in matters of years, not months.

Mr. MCCOLLUM. Mr. Flanigan, with regard to the legislative branch, I raised a question about the financial disclosure statements that Members of Congress make as a matter of ethics for public record. This is different than "financial disclosure," which is a loose term that was used in some of the testimony by Mr. Martini and by the members of the subcommittee here today. When we put a record out there about our employees, Mr. Martini mentioned an office that could have a phantom employee. Clearly you would want to, I think, be able to prosecute that false statement as a criminal offense.

Do you see a distinction? Did you get involved when you were down at the legal office of the Attorney General with any of these

cases involving financial disclosure forms, such as the most celebrated *George Hanson* case out of Idaho? Or was this at a time when you were not down there?

Mr. FLANIGAN. I did not, Mr. Chairman. That was before my time in the Office of Legal Counsel. Those statements currently provide that they are given under penalty of law and site 1001. I believe that is the case for the legislative and the executive branch.

I think other—talking about individual financial disclosure statements, it would, of course, be possible to craft those or to craft a bill that would directly bring such financial disclosure statements under a Federal criminal statute. I would hope the committee would do that.

But as to the broader issue of financial dealings generally, a Member of Congress, his or her office hiring phantom employees or anyone of a number of other possibilities, I think that those—that is adequately covered under existing statutes. I think that you'll probably find anywhere from the False Claims Act to specific sections of title 18 that deal with misuse of government funds, that they would be covered there.

Mr. MCCOLLUM. Well, we certainly want to be as comprehensive as possible. The main point I see in your testimony is a red flag for us that says, first, there are other statutes out here that cover some things Congress does and second, there are statutes out here that have language in them which is the same as what we are seeing the court rule unconstitutional. We should look at those. You have cited a couple, and you have indicated it's obviously not exhaustive. So we are in the process of doing research.

I can assure you your testimony will spur even more indepth research before we enact anything, so we can be sure we pick up any of the flaws that may be as an ancillary result to the court's decision. So I really commend you for that.

Mr. Scott.

Mr. SCOTT. Thank you. I want to thank both of the witnesses for their very indepth testimonies. It has been very helpful.

Mr. Goldstein, the process in some court proceedings where the defendant can get up and make unsworn statements on his behalf is before sentencing, is that right?

Mr. GOLDSTEIN. That is correct. Under the Federal Criminal Code, he has a right of what is described as allocation.

Mr. SCOTT. What is the purpose of him not being under oath?

Mr. GOLDSTEIN. I think the purpose is to encourage he or she to state whatever they think might be helpful to them in mitigation of punishment without subjecting them to the rigors or threat of additional punishment, and to encourage them to pour out their heart at that time.

Mr. SCOTT. And if 1001 applied to the judicial branch, in fact, they would get caught back up in that same process of criminal liability.

Mr. GOLDSTEIN. That is a good point, Mr. Scott. That would provide, in fact, that they could be charged, convicted, and punished for their attempt to reduce their punishment.

Mr. SCOTT. Mr. Flanigan, you mentioned *Morrison* v. *Olson*. What happened in that case?

Mr. FLANIGAN. Mr. Scott, that case actually involved a predecessor of mine in the Office of Legal Counsel, Ted Olson, who while he was in the Office of Legal Counsel submitted testimony in certain documents to Congress in connection with Congress' investigations concerning the EPA at that time. The case of *Morrison* against *Olson* turned on a grand constitutional issue of whether or not the independent counsel statute is consistent with the doctrine of separation of powers under the Constitution. The issue, the relevance to this case, to this issue, is that Mr. Olson's statements and his testimony before Congress, which were later found to be by the independent counsel—to have not violated the law, and the prosecution resulted in no formal charges against Mr. Olson.

The point is that his statements were unsworn. I think that we get—that's sort of an interesting threshold that we can establish, whether the statement is sworn or unsworn.

Mr. SCOTT. If it is sworn, then you can get someone for perjury, so you don't need 1001?

Mr. FLANIGAN. That is correct.

Mr. SCOTT. You mentioned that prosecutors have been somewhat cautious in the past. Can you name the prior cases where people have been prosecuted for false statements to the legislative branch?

Mr. FLANIGAN. The North, the Iran-Contra proceedings are certainly a rich gold mine for them.

Mr. SCOTT. Wasn't he under oath?

Mr. FLANIGAN. No. I believe Colonel North, at least in some of his statements, was not under oath. In other——

Mr. SCOTT. I thought he was prosecuted for things he had said under oath.

Mr. FLANIGAN. I believe he was also prosecuted under 1001 for statements that were unsworn and also letters that were sent. Of course, in that same group of prosecutions you had individuals who were prosecuted for statements made to congressional staff. The allegation was that statements were misleading.

Mr. SCOTT. Could we get just about everything we're aiming at by using other statutes, such as perjury, such as common law fraud? I mean if you had a ghost employee, I would hate to think that you'd need 1001 to protect you from stealing money, to prosecute for stealing money from the Government.

Mr. FLANIGAN. I agree. I think you could.

Mr. SCOTT. So most of what we're aiming at is already covered by other statutes if they're under oath. The things that this gray area—it seems like formal statements by administration witnesses that are flat-out lies—we have had a lot of opinions come along that leave a lot to be desired. With an aggressive prosecution, you could get those roped in, too. I'm not sure that we're aiming at those.

Mr. FLANIGAN. Section 1001 is a big gun. I think you have more surgical tools available to you in the U.S. Code.

Mr. SCOTT. The financial forms and what-not, you mentioned you could put those specifically in the code and specifically outline them as things that you could go to jail for if a person files false statements. That would cover most of the rest of what we're aiming at, I would think.

Mr. FLANIGAN. Yes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. BARR [presiding]. I thank the gentleman.

I'd like to at this time recognize the gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman.

I, too, add my welcome to both of you.

Mr. Flanigan, your experience is on the prosecution side, I guess, or on the law enforcement side, with the Attorney General's Office. If I understand what you are saying, one of the concerns I have—I don't think that people ought to be able to come into a hearing such as this and knowingly give testimony that is false. Are you saying that we can solve that very simply by requiring people to give testimony under oath? If they lied, then we could prosecute under perjury?

Mr. FLANIGAN. I think that appears to be a very simple solution. When you deem it necessary, you can always swear a witness.

Mr. BRYANT of Tennessee. Well, is what you are saying today that that is what we ought to consider doing in lieu of this legislation? Or should we—as I understand the reason that we oftentimes don't ask people to be sworn in, it is out of an accommodation position that you are here to testify for us or someone is here as a courtesy, and we don't do that. This present bill that's under consideration would allow us, if someone gives knowingly false testimony, to prosecute.

Mr. FLANIGAN. In my previous trips even before this committee as a member of the executive branch at that time, as an Assistant Attorney General subject to the Independent Counsel Act, I will tell you of some of the sleepless nights I enjoyed before coming up here, wondering what in my testimony might be taken out of context could result in any possible deferral against me. I think that the question of what I knew and when I knew it becomes very important in those criminal prosecutions. I think that we avoid some of those difficulties by imposing the threshold, that when Congress wants to be very serious about the information that it is getting, when it's important to nail it down, that you require the witness be sworn. That is what we do in courts. The physical act of raising your hand and citing an oath is meant to bring home to the mind the importance of utter veracity.

Mr. GOLDSTEIN. It does add a solemnity, I think, that reminds the individual testifying of the importance of truthfulness; also, probably if you do it selectively, telegraphs those that you might have some question about their credibility.

Mr. BRYANT of Tennessee. You certainly make good points on that.

Mr. Goldstein, I wanted to ask you a question also in followup, because I, too, have that concern that we not chill our court system, particularly our criminal court system, and in any way impact on an accused's right to a zealous defense.

Certainly, no one here is advocating the use of lies and people that have a carte blanche authority to get up there and say anything in the courtroom that they want to say in defense of someone, but I am still not clear, based on the way the pre-*Hubbard* case law had developed, in that there were very few, if any, prosecutions of lawyers for this before *Hubbard* occurred. They seemed

to carve out exceptions and not even really get into the issue in most cases that one would even be considered for prosecution.

Given that background, if we attempt to remedy *Hubbard* by this bill, would you foresee litigation after attorneys? I mean, you have mentioned overzealous prosecutors. I'm sure there were always zealous prosecutors before *Hubbard*, too. That simply did not exist.

Mr. GOLDSTEIN. There was, although there was always that reluctance. Don't forget *Hubbard* got there because of the split in the circuits. There were several circuits that had serious concerns about the application of 1001 to judicial and legislative proceedings. You are correct; there was not only the judicial exception, but footnote 15 of *Hubbard* talks about the fact that out of almost 2,300 cases in the 5 years preceding *Hubbard* they could only find three convictions of statements made to the judicial branch. So you are correct; there are not many to look at there.

But why should we be inviting that when we are serving no useful purpose that is not already served by a judicial officer who is in a position to actually see, understand the context, and actually presides over those proceedings, and is given broad sweeping contempt and other power and authority to regulate the conduct of lawyers before him or her by adding an additional weapon to give one side of this fairly delicately balanced adversary process an additional tool to beat on his adversary's advocate?

Mr. BRYANT of Tennessee. Thank you again. My time has run out. Thank you, Mr. Chairman.

Mr. BARR. OK. I thank the gentleman from Tennessee.

I'd like to recognize the gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman.

I commend these gentlemen for the clarity of their testimony. For that reason, I really don't have any questions of them.

I would make a comment to Mr. Bryant, before he leaves, about this notion that we are accommodating witnesses who come here and we don't want to put them in a position where we put them under oath. The implication of that is that we would rather accommodate them in person with them not knowing that they have that obligation quietly under 1001. It seems to me that we would be better off to, when we are in fact serious, as Mr. Flanigan has indicated, to let witnesses know that they are under oath and subject to prosection. I mean, I don't see any reason, for example, for these two gentlemen or anybody who came in and testified on this issue today to be under oath.

Mr. GOLDSTEIN. That's a relief.

Mr. WATT. Although I did kind of raise my eyebrow when you said there was no precedent out there for something, because then maybe there probably is and maybe you shouldn't have stated, and if I didn't like you, then maybe I could get you prosecuted for that.

Mr. GOLDSTEIN. That's my fear.

Mr. WATT. But if I were really interested in putting either of these gentleman on the spot about what they were saying and encouraging them to be absolutely meticulous in what they were saying and not representing anything that is marginal, then I think it would be better for us as Members of Congress to say that to Mr. Flanigan, that today we expect you to be absolutely on cue, and, therefore, we are going to put you under oath, not kind of "back-

door it" through a statute that most people who come here and testify won't even know exists.

Mr. BRYANT of Tennessee. Will the gentleman yield?

Mr. WATT. Sure.

Mr. BRYANT of Tennessee. What I had understood was the accommodation was not so much that we were accommodating these gentlemen or other witnesses that might come here, but they were actually, in fact, accommodating us by coming to testify. Out of courtesy, we certainly would do that.

It does bother me somewhat, though, that anyone would come in here, courtesy, accommodation, or whatever, with the idea that they could feel comfortable giving less-than-honest testimony without the fear of prosecution. This is where I'm going when I feel a need to support something like Mr. Martini's bill. Regardless of what the circumstances are, I would expect people to testify under oath or not under oath, with all honesty, and expect to do it that way.

You make a good point, and I certainly would yield back.

Mr. WATT. I share your opinion on that. Nobody ought to come in here knowingly giving us false testimony, but I think my inclination would be that I would rather them know when we're serious about it, if they are, in fact, accommodating us by coming. I don't want them to be blind-sided later by some statutory provision that they have never even thought about, just because they happen to say something that may have shaded the truth a little bit.

If we are being that fact-sensitive, we ought to tell them in advance, because most of these hearings, to be honest with you, are not the kinds of things where you worry about somebody coming in and shading the truth. When we get serious and we want the exact truth, when did it happen, what did you know, then they ought to, in fairness to them, know that we are holding them accountable to a higher standard.

Mr. GOLDSTEIN. I might add that that same kind of sworn requirement could be added to matters like applications to practice, which would give you that same protection. Otherwise, if you have application of 1001 violation to courts—for example, a misstatement of the law—you'd have no legal, no novel legal concepts.

If it were applicable to judges, which it would seem to be on its face, every time a judge got reversed, he probably becomes or she becomes a habitual felon. You know, there is no end to the myriad of prosecutions that one can imagine when you make a misstatement of law fall within the ambit of a criminal prosecution.

Mr. WATT. Some of us have expressed those same or similar concerns to rule 11 and the breadth it has.

I thank you, Mr. Chairman, and I thank these witnesses for being here.

Mr. BARR. I thank the gentleman from North Carolina.

The Chair will exercise its prerogative as a member of the subcommittee to take its 5 minutes at this point.

I'd like to thank both witnesses for appearing here today to raise some very, very valid and well-documented concerns with this legislation, some of which I already share and others of which have been pointed out by the witnesses that I will look very, very care-

fully at. I do think that some of the references are a little bit overblown, such as the reference to the Star Chamber. I don't think we're really talking about anything quite that broad here, at least I certainly hope not. I think 1678 is broad enough.

Mr. GOLDSTEIN. That is an example of something that I could probably be prosecuted for under 1001 with some consideration.

Mr. BARR. That may be true, but I do appreciate the thought. I think it is a very important one to keep in mind.

The reference also, or the analogy, to the ethical proceedings and the position of the Department of Justice with regard to ethical breaches by Department of Justice attorneys through the U.S. attorney's office, for example, I think is a little bit overblown also. I think the Department is saying not that the attorneys that work for the Department of Justice should not be held accountable or should not be subject to ethics laws or are above ethics laws; it is really a concern over the form in which they are held accountable, not that they are not accountable at all. But I do appreciate very much the thoughts that were raised.

We did talk just a few minutes ago—I think, Mr. Goldstein, it was in response to some questions by my colleague from Virginia—about maybe taking a look at 18 U.S.C. 1001 and trying to limit it in some way to sworn statements. But then I think he made the very valid point that if it's a sworn statement, it is subject to perjury, and a couple of the other statutes that are referenced in these materials.

But is there any specific language that you at this point are in a position to share with us—really, I guess this would apply to both witnesses—that would address the concerns that we do have with the *Hubbard* decision? Very frankly, I don't feel that comfortable just saying, well, it's up to the judges. We are witnessing one case that's on the national media every single day ad nauseam right now in a State on the west coast in which I do not feel comfortable with allowing somebody with those qualifications to make these decisions. So I would not be comfortable just leaving it entirely up to the judge in a proceeding. I think that 1001 is the appropriate place to do it.

As Mr. Bryant, myself being a former U.S. attorney, we both prosecuted 18 U.S.C. 1001 cases. Just thinking back to those cases that I prosecuted—I certainly can't speak for the gentleman from Tennessee—they were cases involving applications for Federal money or guarantees, such as SBA loans. It's a very important tool that the Government has to attack fraud, abuse, and waste in these programs, particularly the fraud aspect of that. But people are clearly on notice when they sign the forms; there's the language, small as it might be, down at the bottom that puts them on notice. I think that is a concern that I have with 1678. It does not provide that proper notice.

But do either of you have any specific language that you would be at liberty to share with us today that would address those concerns, keeping in mind the concerns that we have with 1678?

Mr. FLANIGAN. I do not, Mr. Chairman.

Mr. GOLDSTEIN. I suppose that the suggestion that we opt all judicial proceedings out of the ambit of 1001 does raise one of your concerns, but I would remind you that most—for example, any tes-

timony in Federal court, any pleading that is filed under oath, any deposition that would be taken, a great deal of what we want to give the solemnity of understanding, like was described here before the congressional committees, is given that solemnity and would be punishable by perjury, in addition to contempt.

So all we are really talking about is a lawyer's argument, which I think is better controlled by a neutral and detached, whether we agree with them or not, person on the scene there than allowing really—placing it in the hand of only one of the adversaries. The defense lawyer can't go and indict anyone. If your experience in the U.S. attorney's office probably taught you anything, it was that we really weren't welcome back in the grand jury room. There's no need for that kind of one-way street in terms of a remedy for this.

I might suggest that the aberration that you described I think could have only occurred in tinsel town. I think one of the dangers of allowing television cameras in courtrooms is that the public has the misperception that what they are seeing in that particular case on television ad nauseam, day-in and day-out, is what goes on in our courtrooms. I can tell you that both prosecutors and defense lawyers throughout this country would stand up and beg to differ that that is not typical of what goes on in courtrooms.

You can take heart that the kinds of problems that we may see come out of that case do not need to be remedied by specific legislation because those are not the general rules. That is not what is going on in the courtroom, and that is not typical of the kinds of judicial proceedings that you would see, particularly not in a Federal court, but I'd suggest in a county court from Los Angeles to New York.

Mr. BARR. OK, so basically, then, what both of you are saying is that the situations that might have heretofore by interpretation been covered by 18 U.S.C. 1001, and that are not now because of the *Hubbard* decision, they don't need to be covered by 1001? So, therefore, we don't have to propose any specific language?

Mr. FLANIGAN. With the exception of the financial disclosure form, which I think—I'm not sure that I can easily fit that under one of the other provisions of the Criminal Code. I think that certainly does need to be addressed.

Then it may be, as I pointed out in my testimony, necessary to scan the other sections of the code which make reference to or use the same phrase that the court interpreted in *Hubbard,* and to determine on a case-by-case basis whether any of those sections should be applied to Congress, and of course to the courts as well.

Mr. BARR. OK. I'd like to thank both witnesses, and at this time recognize the gentlelady from Texas.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Thank you, gentlemen, for appearing.

Mr. Flanigan, due to being detained on the House floor, I may not have heard all of your testimony, and so forgive me if you have already mentioned some of the questions that I'd like to pose.

I would be interested—and I guess I'll make just an overall very brief comment—that as we engage continuously in seeking to create law and order in this Nation, the question always becomes, philosophically, is it the question of more laws or is it a question

of establishing greater morality amongst all of us? It's a difficult dilemma.

I would simply pose the question as we look at the *Hubbard* decision, which as I have not read it line by line, but frankly, it's overall opinion I am inclined to agree with, but at the same time having likewise utilized 18 U.S.C. 1001 as a former counsel investigator for the U.S. Congress, I realize that there is certainly merit in the intent behind this particular Criminal Code.

My question would be, how limiting and how much are we limited in utilizing 18 U.S.C. 1001 in light of *Hubbard?* What can we still use that provision for at this time? Mr. Flanigan, if you'd respond?

Mr. FLANIGAN. Sure, I will give that a try. In terms of statements made, the key distinction is to which branch of government was the statement made. As a result of the *Hubbard* decision, we now know that section 1001 applies only if a statement was made to the executive branch. A statement made to a House Ethics Committee or, for that matter, to the Administrative Office of the U.S. Courts is not covered by 1001.

Ms. JACKSON LEE. However—and I appreciate that in light of Mr. Hubbard or the decision in *Hubbard,* and also the *Bramblett* decision, which talked about an individual that had a named personnel and the person obviously was either not there or received funds for not doing the work—could there have been certainly another action on theft or fraud that did not require the 18 U.S.C. 1001?

Mr. FLANIGAN. Yes. There are several other sections of the U.S. Code that could be used in the prosecution under those circumstances.

Ms. JACKSON LEE. I would, Mr. Goldstein, offer to say to you that you very much highlighted for me the difficulty in being an advocate for a client and all that goes into that advocacy, as well as sometimes many of our lawyers are semi-investigators. They make such representation on their own findings, having not separated themselves from the investigatory work. How limiting, if you will, how chilling, if you can get even more forceful in your previous testimony, would it be to be subjected to that 18 U.S.C. 1001 as this particular legislation would like to see occur?

Mr. GOLDSTEIN. Well, if just the threat of its existence would scare someone like Antonin Scalia, imagine what it's going to do to the rest of the little lawyers around the country that have to go out and apply their trade and work in courthouses across this country?

Ms. JACKSON LEE. The difficulty, of course—and I appreciate my colleagues offering this legislation—whenever you associate legislation with the term "accountability," it suggests that we're not accountable or that we could not hold ourselves responsible for acts that we would not certainly want to see Members of Congress or otherwise be able to slip under.

What would you offer instead of the expansion of this particular legislation? How comfortable do you feel that wayward behavior could be prosecuted and prosecuted properly? I'd ask both of you those questions.

Mr. GOLDSTEIN. I would suggest that it takes little lack of imagination on the part of an able prosecutor to find a remedy for most

acts which would concern us. We have talked about individuals that testify before Congress, the simple act of swearing in; a statement, if the Administrative Office of the Judiciary wanted a statement to be prosecutable if a false statement was made, the simple act of requiring it to be under oath, as in the application to the bar.

Most of the other matters that we understand are fact-specific, involve testimony, sworn testimony, sworn pleadings. We require that kind of act, that kind of solemnity, to notify the person that those are going to have heightened scrutiny in terms of veracity; likewise, a heightened expectation of punishment if one lacks candor and is not honest.

Ms. JACKSON LEE. Mr. Flanigan.

Mr. FLANIGAN. Yes. I think if you look at the past prosecutions under 1001, you can get a pretty good idea as to where the needs are. Putting aside the prosecutions that involve false statements to the executive branch, usually in the context of investigations or obtaining some benefit from the Federal Government, if you focus on those involving Congress mainly, you see that those involve prosecutions for the no-show employee situation, the financial false statement situation. Then you have the independent counsel-based prosecutions relating to statements made by officers of the executive branch. I think if you've got that universe in front, you start to pick and choose which ones you still want to cover as you now address the *Hubbard* decision by legislation.

Ms. JACKSON LEE. Mr. Chairman, thank you very much. I think that, as we have had this hearing, I think it's very important that we have the knowledge of how far-reaching and how chilling potentially the impact would be, and also recognize that accountability is important, but we also need to determine whether the criminal laws can, if you will, entrap the innocent as well. I think we need to strike that balance. I appreciate the testimony of these gentlemen and the enlightened manner in which you have presented it. Thank you very much.

Mr. BARR. OK. I thank the gentlelady from Texas, and recognize the gentlelady from California.

Ms. LOFGREN. Thank you, Mr. Chairman. Actually, the questions I was going to ask have been answered, but I would like to yield to my friend, Mr. Scott, who has a couple of more issues he would like to explore.

Mr. BARR. The gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

I think on the applications to the executive branch, I think there's a difference in the kind of testimony and information that we get here in Congress, because the decision is made solely based on information given on an SBA loan type of thing. Based on the information you give, you get the money. Based on the immigration, you get the result. Therefore, if you have lied, you have to change the process.

A lot of the hearings we have, we're just asking for advocates to come and express opinions. It is not the kind of thing that we're going to necessarily base a decision on, or we can't get the information or advocacy somewhere else.

There are times when we have witnesses, and they are the only ones that know. We rely on them telling the truth because we can't

get the information anywhere else. We have had industry executives, factfinding hearings on what went wrong or something. We place them under oath because we are going to make decisions based on their testimony. So I think to put some under oath and some not under oath, I think is appropriate. I think we have kind of gotten that issue out.

Did someone mention that there was a study of—I think, Mr. Goldstein, did you mention there was a study of pre-*Hubbard* decisions and there were hundreds and only a couple of them were in the judicial branch?

Mr. GOLDSTEIN. It probably addressed both the judicial exception and the restraint that I think Mr. Bryant mentioned. That is, footnote 15 of the *Hubbard* decision talks about the fact that out of the 2,300 convictions that they were able to locate throughout the country in the 5 years that preceded the decision in *Hubbard*, they were only able to locate three convictions that resulted in ; I think actually only five prosecutions, two of which were acquittals, only three convictions that resulted out of a 1001 prosecution involving the judicial branch.

Mr. SCOTT. How many of those were in the legislative branch, or could we get that information?

Mr. GOLDSTEIN. I'm sure you could. Since *Hubbard* really didn't address that issue, there were no statistics to support that question, but I think it would be safe to say, and I think Mr. Flanigan would agree, it's safe to say that there were substantially more in the legislative arena than in the judicial.

Mr. SCOTT. Mr. Chairman, it would be interesting if we could get that analysis to see what the experience has been in the legislative branch. My guess is that it is very rarely used and only raised in those situations where we either had someone under oath or the testimony was such that they probably should have been under oath.

Mr. BARR. If the gentleman would yield—that very clearly comports with my experience as a U.S. attorney. We would ask counsel, if counsel could direct some inquiries to these witnesses or perhaps others, to see if that information can be made available to us.

Mr. SCOTT. Thank you.

I'll yield back to the lady from California.

Ms. LOFGREN. I'll yield back the balance of my time.

Mr. BARR. Thank you. Are there any other questions by any member?

[No response.]

Mr. BARR. In that case, with our thanks going to both of these witnesses for their very important testimony, and thanking all members of the subcommittee for very insightful questions, we stand adjourned.

[Whereupon, at 11:54 a.m., the subcommittee adjourned.]

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